LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 117

PHILIP BART, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 25, 1954
CERTIORARI GRANTED JUNE 7, 1954

INDEX

PAGE

Certified Record of Official Reporter 1

Proceedings 2

Opening Statement on Behalf of the United States 3

Motion to Dismiss the Indictment 38

Motion to Dismiss the Indictment at the Close of the Case 60

Opinion 103

Indictment 108

Arraignment and Plea 113

Motion for Bill of Particulars 115

Motion to Dismiss Indictment 116

Affidavit of David Scribner 121

Affidavit of David Scribner 125

Supplemental Affidavit of David Scribner in Support of Motion to Dismiss Indictment 127

Exhibit 1—Article from the Chicago Sun 139

Exhibit 2—Article from New York Herald Tribune of November 9, 1947 141

Exhibit 3—Article from The Washington Post of August 22, 1948 144

Exhibit 4—Article from The New York Times of August 18, 1949 147

Exhibit 5—Article from The Washington Post of April 1, 1947 149

Exhibit 6—Article from The Washington Star of November, 1949 152

PAGE

Exhibit 7—Article from The Washington Post of November 20, 1947 155

Exhibit 8—Article from The Washington Post of December 30, 1947 158

Order Denying Motion to Strike 160

Order on Motion to Dismiss Indictment 161

Opinion on Motion to Dismiss Indictment 165

Stipulation 179

Verdict 182

Sentence 183

Notice of Appeal 185

Order Extending Time to File Record on Appeal 186

Designation of Contents of Record 187

Clerk's Certificate 189

GOVERNMENT'S WITNESS

Donald T. Appell:

Direct 6

Direct—Resumed 27

Cross 28

Redirect 34

Recross 36

GOVERNMENT'S EXHIBIT

	Admitted Page	Printed Page
1—Public hearing held Wednesday, June 21, 1950	6	7

	PAGE
Proceedings in U. S. C. A. for the District of Columbia Circuit	190
Opinion, Prettyman, J	190
Dissenting opinion, Bazelon, J	203
Judgment	207
Petition for rehearing (omitted in printing)	207
Order denying petition for rehearing	210
Designation of record (omitted in printing)	210
Clerk's certificate (omitted in printing)	210
Order extending time to file petition for writ of certiorari	210
Order granting certiorari	211

1

Certified Record of Official Reporter.

United States District Court

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA vs. PHILIP BART.	Criminal No. 1746-50

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA } ss.: 2

BE IT REMEMBERED, that in the United States District Court for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled case, to-wit:

3

4

Proceedings.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA vs. PHILIP BART, Defendant.	Criminal No. 1746-50

Washington, D. C.,
5 Thursday, May 3, 1951.

The trial of this case was begun before District Judge Burnita Shelton Matthews in Criminal Division No. 3 at 10 A. M.

APPEARANCES:

On behalf of the United States: MR. CHARLES B. MURRAY, Assistant United States Attorney.

On behalf of the defendant: MR. ABRAHAM UNGER, of New York, N. Y., and MR. JAMES T. WRIGHT, of Washington, D. C.

6

The Deputy Clerk: The case of United States v. Philip Bart.

Mr. Murray: The Government is ready.

Mr. Wright: The defense is ready. I should like to make a couple of preliminary observations.

First, I should like to introduce to the Court, Mr. Abraham Unger, who is chief counsel in this case and a member of

the bar of the City of New York, who, with your Honor's kind permission, will engage in the active trial of the case.

My name is Wright, and I am of the local bar.

The Court: Very well, Mr. Wright and Mr. Unger.

Mr. Wright: The second matter is that the defense and the Government have entered into a stipulation waiving trial by jury. We should like to have your Honor rule on its acceptance by the Court at this time. I have it, and it is prepared to be filed.

Mr. Murray: That is correct, your Honor.

The Court: Very well.

OPENING STATEMENT ON BEHALF OF THE UNITED STATES 8

Mr. Murray: May it please your Honor: The indictment in this case charges that the defendant, Philip Bart, appeared before a duly created subcommittee of the Committee on Un-American Activities in the District of Columbia on June 21, 1950, and on that occasion refused to answer questions which are set forth each in a count totaling thirty-two counts.

The evidence will go in chiefly by stipulation, it having been agreed by written stipulation, the original of which is in the file. I am sure, that pursuant to a legislative enactment, the Legislative Reorganization Act, the Committee on Un-American Activities did conduct an inquiry and that on this date this particular defendant did appear before the committee at its chambers in Washington, and there were 9 then had proceedings, a printed copy of which it is stipulated is a correct one. I shall offer that in evidence as we proceed.

Of course, the evidence will show that the defendant did not answer the questions. The argument, the debatable point, will be whether he was excused from answering them or not: whether these refusals were excusable and not unlawful.

The nature of the examination and the indictment is such that not merely one, but two or three questions, as we see it, will be involved. He was asked numerous questions which are outlined in the indictment, counts 1 to 6 inclusive, in regard to what his name was before it was Philip Bart. He refused to answer those questions, and the record will show that he took the position that they were not pertinent. The Government will claim that in that situation he was asserting a position which the law does not give him the right to take; that it was not for him to judge the pertinency; and that he refused to answer the questions, therefore, at his peril.

11 The Government will also claim, naturally, as we anticipate it may be claimed, that his refusal, if the reason was self-incrimination, that he did not claim the privilege against self-incrimination in regard to any of these six questions. Nor does the remainder of the hearing, we will argue, show that he made such a claim in regard to those six questions, or any one of them.

A question of pertinency could arise as to whether those questions were pertinent, naturally. The defendant himself said they were not.

Count 7 presents in itself a different question. The defendant was asked to enumerate his former occupations, and he refused to do that, saying that he would not be a party to an infringement on the rights of the corporation or the organization to which he presumably had belonged

12 in one of those former occupations; that he would not be a party to infringing the freedom of the press. The Government will claim that that did not state for him a legal excuse.

Count 8 and possibly one or two counts subsequently to it raise a still different question.

Count 8 is the question, Who were the other members of the Ohio section of the Communist Party at the time when the defendant himself was an organizer there, as he had pre-

viously admitted himself to be—previously in that same examination.

The evidence will raise the question whether, having admitted that he himself was a member of that particular part of the Communist Party, he had waived the right to refuse to answer as to who the others were. The Government will claim he had waived it, on the authority of the Jane Rogers case. He did in terms as to that question claim immunity from self-incrimination for that reason refused to answer.

The Court: Do you mean with respect to count 8 he specifically claimed immunity?

Mr. Murray: Yes, your Honor, he did claim immunity from self-incrimination with respect to count 8. The Government will show that his claim was not well founded because he had already waived it in that regard.

The subsequent counts will involve more confusing issues and, in a general way, they will raise the question whether by his previous admissions in the same hearing he was being asked in those subsequent questions about matters which could involve him in further incrimination. He did in regard to all the questions subsequent to count 8 claim immunity from self-incrimination. The question that will be raised in this case in regard to those questions will be whether they did or might call for further incrimination.

Those, in a brief way, your Honor, are the issues we expect to face.

Your Honor, I have the investigator for the committee, whom I should like to call to the stand.

The Court: Is the Government relying upon all of these counts?

Mr. Murray: As of now, your Honor, I cannot say that we will abandon any.

The Court: Very well.

Mr. Murray: As the argument proceeds, I am inclined to think we will state a position that will amount to abandonment of some of them.

The Court: Very well.

16 *Donald T. Appell—For Government—Direct.*

Thereupon DONALD THOMAS APPELL was called as a witness and, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Will you state your full name, please? A. Donald Thomas Appell.

Q. You are connected with the Committee on Un-American Activities of the House of Representatives? A. I am, sir, with the position of investigator.

Q. And have been for how long? A. Since, February, 1947.

17 Q. Were you present at the hearing at which Mr. Bart appeared as a witness? A. I was.

Q. That was on June 21, 1950? A. Yes.

Mr. Murray: If the Court please, may I ask the clerk to mark this pamphlet, it being a copy of the hearings? I have indicated in pencil the number of the count which the question relates to.

(The document referred to was marked as Government Exhibit 1 and received in evidence.)

Mr. Murray: I would be disposed at this time to read the hearing, if that is acceptable.

The Court: Very well.

Mr. Wright: I will stipulate, if your Honor please, that what Mr. Murray says is the testimony, is undoubtedly the testimony given by the witness in these questions and answers.

18

The Court: We have to hear it sometime, so if Mr. Murray wishes to present in this way, we had better do it this way.

Mr. Wright: Very well.

Mr. Murray: I am beginning to read from page 2633, which is the first page of the pamphlet.

(Mr. Murray read as follows):

Government Exhibit 1.

"Wednesday, June 21, 1950

"United States House of Representatives,
"Subcommittee of the
"Committee on UN-American Activities,
"Washington, D. C.

"Public Hearing

"A subcommittee of the Committee on Un-American Activities met pursuant to call at 11:10 a. m. in room 226, Old House Office Building, Hon. Francis E. Walter presiding.

"Committee members present: Representatives Francis E. Walter (chairman), Burr P. Harrison, Francis Case, and Harold H. Velde (arriving as indicated).

"Staff members present: Frank S. Tavenner, Jr., counsel; Louis J. Russell, senior investigator; Donald T. Appell and William A. Wheeler, investigators; and A. S. Poore, editor.

"Mr. Walter: The meeting will come to order. For the purpose of this hearing the chairman has designated a subcommittee consisting of Messrs. Harrison, Case, Velde, and Walter, all being present.

"Mr. Harrison: Mr. Velde will be here presently.

"Mr. Tavenner: Mr. Philip Bart.

"Mr. Walter: Will you raise your right hand, please. You swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

"Mr. Bart: I do.

22 *Government Exhibit 1.*

"Testimony of Philip Abraham Bart, Accompanied by His Counsel, Abraham Unger.

"Mr. Tavenner: You are Mr. Philip Bart?

"Mr. Bart: I am.

"Mr. Tavenner: Are you represented here by counsel?

"Mr. Bart: I am.

"Mr. Tavenner: Will counsel please identify himself for the record?

"Mr. Unger: Abraham Unger, New York City. Admitted to the bar of New York. Member of the firm of Unger, Freedman & Fleischer, 100 Fifth Avenue, New York City.

23 "Mr. Tavenner: Is Philip Bart your full name?

"Mr. Bart: It is.

"Mr. Tavenner: When and where were you born?

"Mr. Bart: I was born in Warsaw, Poland.

"Mr. Tavenner: On what date?

"Mr. Bart: June 28, 1902."

Count 1:

"Mr. Tavenner: Were you born under the name of Philip Bart?

"Mr. Bart: I wonder what this question has to do here?

"Mr. Unger: I think that is a fair point to have made. He stated to you that his name is Philip Bart. I think that should be adequate, Mr. Chairman.

24 "Mr. Bart: It is my legal name. I vote under that name."

Count 2:

"Mr. Tavenner: When did you take that name?

"Mr. Bart: Many years ago.

"Mr. Tavenner: When?

"Mr. Bart: I don't care to discuss it.

"Mr. Unger: Mr. Chairman, again, I think the purpose of the inquiry here must have something to do with something other than whether Mr. Bart had a different name at birth or any time in his life. He has stated that is his legal name. I think that should be sufficient to identify him for your committee. Beyond that, I don't know what it is for.

"(Representative Velde enters hearing room.)

"Mr. Walter: That will be developed, of course. It is an entirely proper question. If you are not going to answer, you just decline to answer and state your reasons for declining.

"Mr. Bart: The reason, is Philip Bart is my legal name. I vote by that name and use that name only.

"Mr. Harrison: Do I understand you refuse to answer the question?

"Mr. Bart: I will not answer it because it is not pertinent to the hearing.

"Mr. Case: Mr. Chairman, I think he stated that he took that name a certain number of years ago. When was it that you took that name?

"Mr. Bart: I do not recollect.

"Mr. Case: When did you come to the United States?

"Mr. Bart: I came here as a child. I do not know the date.

"Mr. Case: How old were you when you came?

"(Witness confers with his counsel.)

"Mr. Bart: I was 10 or 11 years old.

"Mr. Case: Ten or eleven years old?

"Mr. Bart: Yes.

"Mr. Case: What was your name at the time you came to the United States?

"Mr. Bart: I have already answered this question.

"Mr. Walter: What was it?

"Mr. Unger: Mr. Chairman, I think we are spending a good deal of time, with all due respect to the Chair, on a point that has absolutely no bearing on any issue here.

"Mr. Walter: That is only your opinion.

"Mr. Unger: I said that was my opinion.

"Mr. Case: Mr. Chairman, I don't know what the question will lead up to, but it certainly has been customary, when we have been interrogating witnesses who have come to the United States from other countries, to know when they came to the United States, and to know under what name they came, and to know the name shown on the passport. There is nothing improper or out of the way in asking such a question. I think we should have an answer to the question of the name he had when he came to the United States.

29 "Mr. Unger: Are you suggesting the inquiry has to do with what this man did when he was 10 years old? You are talking about a 10-year-old boy.

"Mr. Walter: Just a moment. I think Mr. Tavenner should be able to proceed, and after his questions, Mr. Case, you may ask such questions as you may desire. May I suggest, Mr. Tavenner, that you refresh the witness' recollection by telling him what his name was before he assumed his present name? Proceed.

"Mr. Tavenner: You are a naturalized American citizen?

"Mr. Bart: Yes.

"Mr. Tavenner: How did you become naturalized?

"Mr. Bart: Through process of my father.

"Mr. Tavenner: What was your father's name?

"Mr. Bart: I have already dealt with this question.

30 "Mr. Tavenner: When was your father naturalized?

"Mr. Bart: I do not remember.

"Mr. Unger: Just a minute.

"(Witness confers with his counsel.)

"Mr. Bart: About 30 years ago.

"Mr. Tavenner: Do you refuse to tell the committee your father's name?

"Mr. Unger: Mr. Tavenner, he doesn't refuse to tell the committee. He is trying to tell the committee that this line of inquiry is a highly improper one.

"Mr. Walter: That is not within his province. The committee determines what is proper and what is not proper, and it is not up to you to determine that.

"Mr. Unger: That is true.

"Mr. Case: Mr. Chairman, it seems to me the counsel should advise his client and not the committee.

"Mr. Unger: I am not trying to advise the committee. I tried to respectfully point out why it is an improper question. He is not ashamed of his father's name or his mother's name. What difference can it possibly make what his name was when he came here?

"Mr. Walter: We are not going to have you arguing with the committee or giving us your legal opinion, which may or may not be worth anything.

"Mr. Unger: I have no further comment on the question.

"Mr. Walter: All right.

"Mr. Bart, you claim citizenship by virtue of your father's citizenship; is that right?

"Mr. Bart: That is right.

"Mr. Walter: Under what name did your father become a citizen of the United States?

"Mr. Bart: Under his own name.

"Mr. Walter: What was that name?

"Mr. Bart: I have already stated my reply to this question as far as I am concerned.

"Mr. Walter: How can you claim citizenship by virtue of your father's citizenship if you don't know what name your father used when he became a citizen?

"Mr. Unger: Mr. Chairman——

"Mr. Walter: Let the witness answer the question. You may advise your client.

"Mr. Bart: I have answered I am a citizen by virtue of that fact, and that this is my legal name by which I vote and am registered and am known.

"Mr. Walter: When did you legally change your name?

"Mr. Bart: Many years ago.

"Mr. Walter: Where?

"Mr. Bart: In the city of New York.

"Mr. Walter: Did you have your name changed in court?

"Mr. Bart: Yes; about 15 years ago.

"Mr. Unger: His answer is about 15 years ago.

"Mr. Walter: I understand. What name did you change your name from?

"Mr. Bart: I have already stated my reply to this question.

"Mr. Harrison: I understand you refuse to answer the chairman's question?

"Mr. Bart: My answer is that I have answered what
35 my name is here, which is the only question pertaining to the inquiry, it seems to me.

"Mr. Walter: Of course all of this is a matter of public record?

"Mr. Bart: Correct.

"Mr. Walter: And then I suppose you know that under the law a question innocent on its face can't be arbitrarily ignored. You can't refuse to answer such a question without running the risk of the consequences.

"Mr. Unger: I think, again, Mr. Chairman, Mr. Bart has indicated very plainly he has not been contumacious in any regard. He states his name has been Philip Bart for a large number of years.

"Mr. Walter: Don't argue with the committee. You advise your client as you see fit.

36 "Mr. Case: Mr. Chairman, it seems to me the witness should be advised of the possibilities of contempt when he fails to answer a question as simple and as proper as your question as to what his name was before it was changed.

"Mr. Walter: No. He has counsel. Counsel knows that is the law. Proceed, Mr. Tavenner.

"Mr. Tavenner: Mr. Bart, I understood you to say that you changed your name legally about 15 years ago?

"Mr. Bart: I do not recollect. Maybe a few years less.

37

"Mr. Tavenner: And that was done in New York City, was it?

"Mr. Bart: Correct.

"Mr. Tavenner: By what court?

"Mr. Bart: I do not recollect.

"Mr. Tavenner: Are you now married or are you single?

"Mr. Bart: I am married.

"Mr. Unger: Just a minute.

"(Witness confers with his counsel.)

"Mr. Bart: New York county, I think.

"Mr. Tavenner: What was your answer?

"Mr. Bart: The original answer, I don't know.

"Mr. Unger: He thinks New York County.

38

"Mr. Bart: You asked me what court. I said I didn't know.

"Mr. Tavenner: When you changed your name was it to your present name of Philip Bart?

"Mr. Bart: Correct.

"Mr. Tavenner: Do you have a middle initial?

"Mr. Bart: I do.

"Mr. Tavenner: What is it?

"Mr. Bart: 'A'.

"Mr. Tavenner: What does it stand for?

"Mr. Bart: Abraham. I do not use it.

"Mr. Tavenner: I asked you the question as to whether you are now married or whether you are single.

"Mr. Bart: I am married.

39

"Mr. Tavenner: When, where, and to whom were you married?

"Mr. Unger: Just a minute.

"(Witness confers with his counsel.)

"Mr. Bart: I would like to know what the committee has in mind in this inquiry here. These questions raised so far here do not seem to pertain to any inquiry. I don't know what you want to know, what you are interested in.

"Mr. Tavenner: We want to know the answers to the questions. The full purpose of them, of course, will be developed in the course of the testimony.

"Mr. Unger: Mr. Chairman, what concern is it of anybody here——

"Mr. Walter: We permit you to appear with your client for the purpose of advising your client. You apparently are old enough to have had some experience in court.

"Mr. Unger: Yes, indeed.

"Mr. Walter: Of course, you know there are many preliminary questions asked witnesses, leading up to some point. As they are propounded you will readily learn what
41 the purpose is. Just advise your client and don't argue with the committee, because we don't rule on objections.

"Mr. Tavenner: Now will you answer the question, please?

"Mr. Bart: What is the question?

"Mr. Tavenner: Will you read the question, please?

"(The pending question was read by the reporter, as follows: 'When, where, and to whom were you married?')

"Mr. Bart: I was married to Constance Strauss.

"Mr. Tavenner: Will you spell the last name, please?

"Mr. Bart: S-t-r-a-u-s-s.

"Mr Tavenner: When?

"Mr. Bart: I refuse to answer the question, in accordance with my rights under the Constitution.

"(Witness confers with his counsel.)

42 "Mr. Tavenner: Do I understand you refuse to answer the question as to when you were married to Constance Strauss?

"Mr. Bart: I was married around 1939.

"Mr. Tavenner: Was this your only marriage?

"Mr. Bart: Yes.

"Mr. Tavenner: Mr. Bart, will you briefly summarize your educational background for the committee, giving the

names of the cities and States where you were educated, just in brief?

"Mr. Bart: I went to the public schools of New York, left at the age of 15 and went to work. That was the only education that I received, the only formal education that I received.

"Mr. Tavenner: What is your present occupation?

"Mr. Bart: I am the general manager of Freedom of the Press Co., Inc.

"Mr. Tavenner: Does that organization publish the Daily Worker?

"Mr. Bart: It does.

"Mr. Tavenner: Are you on the editorial staff of the Daily Worker? 44

"Mr. Bart: I am its general manager.

"Mr. Tavenner: In addition to your position as general manager for this organization, do you hold any other position from which you receive a salary or gratuity?

"Mr. Bart: I do not.

"Mr. Tavenner: Will you briefly summarize for the committee other positions which you have held and from which you have received a salary or gratuity, prior to the position you now hold?

"(Witness confers with his counsel.)

"Mr. Bart: It is evident that in these questions a newspaper is involved, and I shall not answer because I feel that this committee, if it proceeds with this kind of questions, is infringing on the first amendment of the Constitution of our country, freedom of the press, and I shall not be a party to anything of that kind. 45

"Mr. Tavenner: That is the ground upon which you refuse to answer the question as to what positions you have held prior to your present position?

"(Witness confers with his counsel.)

"Mr. Walter: Did you ever hold any positions other than positions with newspapers?

46 *Government Exhibit 1.*

"Mr. Bart: I did.

"Mr. Walter: What were they?

"Mr. Bart: I was organizer and head of the Communist Party at different times, in different years.

"Mr. Walter: Where?

"Mr. Bart: In Illinois and Pennsylvania, among many.

"Mr. Tavenner: The Daily Worker of March 28, 1936, shows you to have been a section organizer for the Communist Party in Ohio. That is correct, is it not?

"Mr. Bart: Most likely.

"Mr. Tavenner: Well, you know whether you were a section organizer for the Communist Party in Ohio, do
47 you not?

"Mr. Bart: I do not know the exact period of time you mentioned. It is 14 years ago.

"Mr. Tavenner: Who were the other officials of the Ohio section of the Communist Party during the period of time you were organizer there?

"Mr. Bart: I object to this question. I will not answer it, standing on my rights in accordance with Article V of the Constitution, and furthermore I protest because this committee has asked this question of numerous people and has infringed upon their rights as American citizens.

"Mr. Tavenner: I think, Mr. Bart, I should point out that your testimony relating to other people who were associated with you at that time could not in any way incriminate you under the Fifth Amendment.

48 "Mr. Unger: I should like to correct you, Mr. Tavenner.

"Mr. Walter: You advise your client.

"Mr. Tavenner: You have told us you were a section organizer for the Communist Party in Ohio, and my question now is, who were the officials who worked with you in that work, that is, officials of the Ohio section of the Communist Party?

"Mr. Unger: Permit me to advise my client that Mr. Tavenner, counsel, is in error in his interpretation of the

Constitution so far as the Fifth Amendment is concerned, and that Mr. Bart, the witness, is entirely correct in his interpretation of the Constitution, and has a right to assert that this committee has no right—no right, let me make it plain——

"Mr. Walter: Under our procedure the attorney is permitted to advise his client and then the client, the witness, answers the question. You may advise your client.

"Mr. Case: Mr. Chairman, let us have an understanding that if counsel is going to be permitted to make a stump speech he gets in the position of testifying rather than the witness.

"Mr. Unger: That is not fair. I don't like to be accused 50
of making a stump speech when I make a legal argument.

"Mr. Walter: You do not make legal arguments here. When a question is asked your client, you advise your client, and then let him answer the question.

"Mr. Unger: As he has stated in his previous answer, he is not required to testify against himself.

"Mr. Bart: I stand on the advice of my counsel. I am not required to testify against myself, and in accordance with Article V of the Constitution I will not answer the question.

"Mr. Tavenner: I was not asking you to testify against yourself. I was asking you to state the names of other persons associated with you.

"Mr. Bart: I consider this an attempt on the part of the committee to use this against myself as well as against 51
others, as it has on many previous occasions.

"Mr. Walter: And therefore you refuse to answer?

"Mr. Bart: I refuse to answer.

"Mr. Tavenner: Mr. Bart, in 1934, according to the Party Organizer, a publication issued by the central committee of the Communist Party, you were organizational secretary of district 6 of the Communist Party. That was

52 one of the positions to which you referred, was it not, in which you had been engaged in Communist Party work?

"(Witness confers with his counsel.)

"Mr. Bart: On the basis of the First Amendment to the Constitution, the committee has no right to ask me my political affiliations, and on the basis of the Fifth Amendment I believe that this question is directed and may tend to be used against me; consequently, I will not reply.

"Mr. Tavenner: I hand you the December 1934 issue of Party Organizer issued by the central committee, Communist Party United States of America, and I refer you to page 3, where there is an article entitled 'The Recruiting
53 Campaign in Cleveland District,' by Phil Bart, organizational secretary, district No. 6. I will ask you to examine it. Did you make that contribution to that magazine?

"Mr. Bart: I will answer the question similarly to the way that I answered the previous one, on the grounds of the First Amendment to the Constitution, which does not allow looking into the political affiliations of individuals, and on the grounds of the Fifth Amendment, it may tend to be used against me by this committee.

"Mr. Tavenner: I offer the pamphlet for identification only and ask that it be marked 'Bart Exhibit No. 1.'

"(The pamphlet above referred to, marked 'Bart Exhibit No. 1' for identification only, is filed herewith.)

"Mr. Tavenner: At this time, in 1934, who were the officers of district 6 of the Communist Party?

54 "Mr. Unger: Mr. Chairman, may I ask you this: Apparently a series of questions of the same character is going to be asked by counsel. I do not object to counsel asking the questions, if that is what he wants to do, but it seems the Constitution should be applied to you as well as everybody else. You have no right to make inquiries into things of that kind. Isn't that perfectly reasonable to suggest? Whether you like it or not, you are bound by the Constitu-

tion in the same way I am and my client is, and therefore you should live up to it.

"Mr. Walter: The members of the committee haven't the faintest idea what questions are going to be asked. In fact, none of us knew who was going to be here. It is apparent that the witness does not intend to cooperate with the committee, and therefore I do not see why we should ask any further questions, and therefore the witness is excused.

"Mr. Unger: I want to say this——

"Mr. Harrison: Mr. Chairman, I don't care to hear from this gentleman.

"Mr. Unger: Come, now. I am counsel and I think I should be treated politely. I don't say that to you, that I don't care to hear from you. My Lord. 56

"Mr. Walter: We have permitted you to appear on behalf of your client. You have been permitted to advise your client.

"Mr. Unger: I object to this improper remark on the part of this Congressman. I have just asked the witness one question with reference to one you asked before——

"Mr. Bart: Let it go.

"Mr. Walter: Mr. Tavenner is going to ask a question along a different line entirely.

"Mr. Tavenner: Mr. Bart, have you traveled outside the continental limits of the United States since your first arrival here?

"Mr. Bart: I refuse to answer this question, which, according to Article V of the Constitution, may be used against me and incriminate me. 57

"Mr. Tavenner: In what way could information of that character be used to incriminate you?

"Mr. Bart: That is up to the committee.

"Mr. Tavenner: I might say to you that if the point you have in mind is the probable misuse of passports, the statute

of limitations would long since have run against such an offense.

"Mr. Bart: I have no misused passports."

I think that should be:

"I have not misused passports."

The report shows it as "not".

Mr. Wright: That is correct.

Mr. Murray: (Continuing reading):

"Mr. Tavenner: I am just advising you, if that is the point you have in mind.

59 "Mr. Bart: I haven't stated whether I have been out of the United States, either, so don't accuse me.

"Mr. Tavenner: Have you ever been out of the United States?

"Mr. Bart: I refuse to answer.

"Mr. Tavenner: Have you ever used the name John William Fox?

"Mr. Bart: I will not answer this question, which, in accordance with Article V of the Constitution, may be used by this committee to incriminate me.

"Mr. Tavenner: Mr. Bart, I hand you a photostatic copy of an application for passport signed in the name of John William Fox, and I will ask you to look at the photograph appearing on the second page and state to me whether or

60 not that is a photograph of you?

"Mr. Bart (after examining document): I refuse to answer.

"Mr. Unger: I thought you just said you had nothing to do with passports.

"Mr. Tavenner: In reply to counsel's question——

"Mr. Walter: Mr. Tavenner, ask the witness questions.

"Mr. Tavenner: That passport application is dated in 1932, and the statute of limitations has long since applied

against any claim of false use of it. Now will you answer the question?

"Mr. Unger: If that is what it is, in 1932—and I haven't checked it to see—I would like to know what your concern is about. But in any event, the witness has already answered the question, and I think quite correctly.

"Mr. Tavenner: Did you use that passport, Mr. Bart?

"Mr. Bart: I will not answer this question, because, in accordance with Article V of the Constitution, it may be used against me by this committee to incriminate me at some future date.

"Mr. Tavenner: Mr. Bart, were you ever known within the Communist Party by the name of Jack Childs? 62

"Mr. Bart: I will not answer this question because, in accordance with Article V of the Constitution, it may be used against me by this committee and may tend to incriminate me.

"Mr. Tavenner: Do you know William Weiner?

"Mr. Bart: I refuse to answer this question for the same reason.

"Mr. Tavenner: Do you know Ephriam Schwartzman?

"Mr. Bart: I refuse to answer for the same reason given before.

"Mr. Tavenner: I hand you a photostatic copy of a letter bearing date February 21, 1939, signed by E. Schwartzman, national secretary, Jewish Peoples Committee, addressed to Mr. Jack Childs, and I will ask if you received that letter?

"Mr. Bart (after examining document): I refuse to answer because, in accordance with Article V of the Constitution, this may be used by this committee and tend to incriminate me. 63

"Mr. Walter: Mr. Bart, did you ever live at 148 Second Avenue, New York?

"Mr. Bart: I refuse to answer the question for the same reason.

64 *Government Exhibit 1.*

"Mr. Tavenner: In 1939 did you live at 854 West One Hundred and Eightieth Street, New York City?

"Mr. Bart: I refuse to answer this question for the reasons I have already given.

"Mr. Tavenner: Mr. Bart, I will now read you a letter addressed to Mr. William Weiner, dated February 23, 1939, signed by 'Jack.' Before reading it, I will ask if you wrote that letter?

"Mr. Bart (after examining document): I refuse to answer this question because, in accordance with Article V of the Constitution, this may be utilized by this committee against me as it has against many others, and tend to
65 incriminate me.

"Mr. Tavenner: I will read the letter:

"Dear Will: I am sorry for the delay in sending you the $100. Your letter didn't reach me until this morning, and the office, as you know, was closed yesterday.

"Today, Thursday, the situation is such: Max is still managing, and sees no great 'danger,' so to speak. No big requests are made, and we still have a dozen of your checks left. It would help much, though, if Bill Browder would pay his dues and not deduct the daily loan of $2,500 plus the $600 tax money of Camp Unity. We know that you don't agree with this, and perhaps a note to him might persuade him to make some payments to us. Today he said he would let us know on Saturday how much money he
66 would let us have on Tuesday. The Garden meeting will be held on Monday (by Monday he will owe us about $5,000).

"Joe somehow manages to get by, and seldom comes upstairs. He told me that he would be able to steer through until you return, and that the drive is still slow. He is looking forward to the next weekend. The last weekend was not so bad. He still owes us the $1,500.

Government Exhibit 1.

"The paper company granted another carload to Chicago, and was willing to wait for payment until you returned. Joe made this agreement with them. Chicago has had two big runs, due to the primaries which will be held there soon. Hundreds of thousands of copies of the Record have been printed. I don't think they will bother us very much until you return.

"Earl, in a letter to the boys last week, asked that traveling be more systematic and that they coincide with the speakers bureau schedule. This will help greatly in lessening traveling expenses. The idea is to cut it down.

"Will Weinstone was given $50 for fare and several weeks wages in advance. He said at the time that it would be enough. I am sorry if you were caused any inconvenience because of the additional amounts you have had to give him.

"The response of the State budgets is fair. We will be able to give you a report by the time you return. Other details can wait until you come back.

"I am sorry to write you such a long letter, but you wanted to get some idea of the situation here. Try if you can, to stay longer, for as you know already, the people here know that you are out of town, and they do not come around, and very few phone calls come in for you.

"Everybody here is in good health, but it is cold as 'hell.' Yesterday was the coldest day of the year, with all the trimmings—snow, sleet, rain.

"Thanks for the regards. Please forward our best to all."

"It is signed 'Jack.'

"Mr. Bart: Can I glance at that once more?

"Mr. Tavenner: Yes (handing document to witness).

"Mr. Unger: Mr. Tavenner is a good reader, but otherwise I don't know what it has to do with him or the committee.

"Mr. Case: What was the date of the letter?

"Mr. Tavenner: February 23, 1939.

"Mr. Bart: I have already answered this question.

"Mr. Tavenner: You have no further reply to make?

"Mr. Bart: No.

"Mr. Tavenner: Did you know Bill Browder, the brother of Earl Russell Browder?

"Mr. Bart: I will not answer this question for the same reason I have not answered the others.

"Mr. Tavenner: What connection was there between the Communist Party and the control of the resort camp known as Camp Unity and referred to in this letter?

"Mr. Bart: I object to this whole line of questions, which does not concern myself, and I repeat again that this aims
71 to incriminate me, and in accordance with Article V of the Constitution I will not be a party with this committee to such actions.

"Mr. Case: Mr. Chairman, counsel says he sees no connection, and the witness is constantly saying there is some connection.

"Mr. Unger: Are you a lawyer? That isn't what that means, you see. If that is Mr. Case and he is a lawyer, perhaps I ought to correct him as to his interpretation of law. So you won't answer. Are you afraid to answer?

"Mr. Case: No. I am not a lawyer.

"Mr. Walter: We are permitting you to appear. You don't appear as a matter of right. And I hope you will advise your client and not argue with the committee.

"Mr. Unger: I think the record should show that the
72 interpretation put on the answer——

"Mr. Walter: The record shows exactly what took place.

"Mr. Unger: Very well.

"Mr. Tavenner: Mr. Bart, at the time of the writing of this letter of February 23, 1939, did you hold any position in connection with the publication of the Record, a newspaper published in Chicago, Ill.?

"Mr. Bart: I will not answer this question for the same reason.

"Mr. Tavenner: Did you know William Weiner under the Communist Party name of Blake?

"Mr. Bart: I have already answered previously the question of whether I knew William Weiner.

"Mr. Tavenner: Did you know him under the name of Blake?

"Mr. Bart: I have answered whether I knew Mr. Weiner under one name or under another.

"Mr. Tavenner: Did the World Tourists, Inc., ever pay out any transportation funds for you for any purpose?

"Mr. Bart: I refuse to answer this question in accordance with Article V of the Constitution, because the whole aim here is not the asking of questions but trying to utilize it against me as it has been utilized against many others, as this committee has a record. 74

"Mr. Tavenner: Mr. Chairman, it seems apparent that the witness will not cooperate in answering questions. There are others that might be asked, but I see very little point in doing so. Before closing my questions I do want to ask one other question. Do you know Marcel Scherer?

"Mr. Bart: I will answer it the same way, that I will not answer the question because in accordance with Article V it may be used by this committee to tend to incriminate me, as it has been used against the Communist Party.

"Mr. Tavenner: You have told us you held various positions in the Communist Party. What were they besides organizer in Ohio, and you mentioned other States, Pennsylvania, Illinois, and I believe one other. What positions have you held besides organizer in those four States? 75

"Mr. Bart: I will not answer this question because it is part of a pattern to incriminate me, and in accordance with Article V of the Constitution I stand on my right not to reply.

"Mr. Tavenner: Did you engage in the work of recruiting, in the State of Illinois, prospective students to go to Moscow for study at the Lenin Institute?

"Mr. Unger: You got everything in that one, didn't you —Moscow, Lenin Institute, and recruit. This ought to make a headline.

"Mr. Bart: I refuse to answer the question because it is a question asked to incriminate me under Article V.

"Mr. Walter: Article V of what?

"Mr. Bart: Of the Constitution of the United States.

"Mr. Tavenner: Do you know the names of any American citizens or any residents of the United States who attended the Lenin Institute at Moscow?

"Mr. Bart: I will not answer this question because in accordance with Article V of the Constitution of the United
77 States this may tend and be utilized to incriminate me and others, of my party, especially.

"Mr. Tavenner: Did you ever attend Lenin Institute?

"Mr. Bart: I refuse to answer for the same reason.

"Mr. Tavenner: I have no further questions, Mr. Chairman.

"Mr. Walter: The witness is excused.

"Mr. Bart: Mr. Chairman, I want to say that this committee has called me to smear me and everybody here, and has sent people to jail for that. You did not call me because you were interested in any facts.

"Mr. Walter: If you thought as much of the Constitution, behind which you are hiding, as you say you do, you would be perfectly willing to assist this committee in trying to ascertain what alleged Americans were trained in Russia.
78 "Mr. Bart: I will defend the Constitution, but I will not be a party in trying to send people to jail.

"Mr. Walter: Very well. You are excused.

"(Short recess.)

"Mr. Appell: Mr. Bloch, the committee will hear you and your client at 3:30 this afternoon.

"(Thereupon, at 12:05 p. m., on Wednesday, June 21, 1950, an adjournment was taken until 3:30 p. m. of the same day.)"

By Mr. Murray.

Q. Mr. Appell, were you familiar with the line of interrogation of this witness before he appeared? That is, did you have something to do with the preparing of the questions? A. Yes, sir. I prepared the majority of the questions which were asked Mr. Bart.

Q. Was he, to your knowledge, known to the committee or believed by the committee to be a member of the Communist Party? A. He was.

Q. Will you state to the Court whether or not it had been the experience of the committee, to your knowledge, to observe that members of the Communist Party used different names at different times? A. Many witnesses subpoenaed before the committee were members of the Communist Party and were known to have used fraudulent names. That is one of the methods by which the Communists operate. 80

Mr. Unger: I move to strike the latter part of the answer as being not responsive.

Mr. Murray: I have no objection to the striking of the last part.

The Court: Very well; it will be stricken.

Mr. Murray: Something to the effect: "That is the way they operate."

By Mr. Murray. 81

Q. Mr. Appell, do you know, did you then know, and to your knowledge did the committee know, what District No. 6 of the Communist Party was and in what location it was? A. The committee knew District 6 of the Communist Party to be the Ohio area, primarily Cleveland and vicinity.

Mr. Murray: I am necessarily a bit slow in this. I hope Your Honor will indulge me in a little delay.

The Court: Very well.

Mr. Murray: Your Honor, I think I have concluded my direct examination. I am prepared to take a position in regard to some of the counts. I will state it, if the Court and counsel wish, at this time.

Mr. Unger: I have no objection. I think it would be useful to hear from Mr. Murray as to what his position on that is, if the Court so desires.

The Court: Very well.

Mr. Murray: Your Honor, the Government, in order
83 to clarify the issues, will abandon count 9 and counts 11 through the indictment—11 to 32, inclusive.

The Court: Do you mean that would leave 1 to 9?

Mr. Murray: I am sorry. I made a mistake. No; that is right. That would leave 1 to 8, and 10—counts 1, 2, 3, 4, 5, 6, 7, 8, and 10.

The Court: Count 32 is the last one?

Mr. Murray: Count 32 is the last, Your Honor.

The Court: I see. Then, it is 1 to 10, excluding 9.

Mr. Murray: That is the way to state it.

Cross-examination by Mr. Unger.

Q. Mr. Appell, you helped to prepare for the inquiry of Mr. Bart, the defendant in this case? A. Yes, sir.

84 Q. Did you consult with the members of the committee in the course of that preparation? A. No, sir.

Q. The purpose of your preparation was to inquire into something that had to do with the Communist Party or Communism; is that correct? A. Yes, sir.

Q. Did you inform the committee before the hearing as to what it was that you intended to interrogate Mr. Bart about? A. The committee was informed as to the witness and the subject generally, but not in detail.

Q. I wanted to know, Mr. Appell, whether you informed the committee, or whether you know that Mr. Tavenner or any other member of the investigating staff informed the committee, as to what the purpose of this inquiry was. A. The members of the Committee on Un-American Activities are notified through notices sent to them through the mail.

Q. No. That is not quite an answer to the question. I think you know my question. I asked you what you did. You are on the stand. A. I did not.

Q. I direct myself to you. A. I did not personally.

Q. No. Do you know whether any of your fellow investigators or the counsel so advised the members of the committee? A. I have no direct knowledge of what they did.

Q. From your practice, would you say the committee had been informed in this case as to what it was that this inquiry was to be about? A. As I said, we notified the members through the mail as to the witnesses to be heard and the general subject which they were to be interrogated about.

Q. Did you advise the witness prior to his investigation as to what he was being called for? A. No, sir.

Q. So he had no idea of what he was being called for before coming to the hearing?

Mr. Murray: I object. Of course the witness would not know what his idea was.

The Court: Would you read the question?

(The last question was read by the court reporter.)

The Court: The objection is sustained.

By Mr. Unger.

Q. When your inquiry was made on the twenty-first of June, did you know who the defendant was? A. Yes, sir.

Q. Was it Mr. Philip Bart, who is sitting in this room? A. Yes, sir.

Q. Had you made service of the subpoena upon him, by the way? A. No, I had not.

Q. But you knew that was the man you wanted there? A. Yes.

Q. And you knew he was Philip Bart? A. Yes.

Q. You knew he was connected with the Daily Worker? A. Yes, sir.

Q. That is a newspaper published in New York City? A. Yes, sir, by the Communist Party.

Q. That knowledge was held by all the members of your staff, I assume? A. Yes, sir.

Q. Also by Mr. Tavenner, the counsel? A. Yes, sir.

89 Q. Let me ask you, Mr. Appell, if in the preparation of your investigation and for the inquiries that you made, you discussed at all the constitutionality or the propriety of any question that was to be put to a witness.

Mr. Murray: Pardon me. I am disposed to object to: Did he discuss the constitutionality of a question.

Mr. Unger: With any member of his staff or counsel.

Mr. Murray: I object to that.

The Court: What is the purpose of this inquiry?

Mr. Unger: The purpose of it, Your Honor, is to determine in advance, now, whether the committee had any intention to avoid asking questions which on their face were clearly self-incriminating, because if that was not so, then it explains almost immediately the nature

90 of the examination that was conducted there.

I think it would be helpful to Your Honor to understand how this entire interrogation came about and why so many questions were put and so many answers refused.

The Court: The committee has a right to ask questions.

Mr. Unger: Yes.

The Court: The witness is to answer them unless, of course, he wishes to stand upon some claim of constitutional privilege.

Mr. Unger: I am merely inquiring as to whether the committee had any policy on that question; that is, did it ignore the fact that a constitutional right was involved and say, "Let that wait until we pass upon it," or did it consider it in advance, and what was the position that it took?

The Court: Sir, the objection is sustained.

Mr. Unger: Thank you, Your Honor.

By Mr. Unger.

92

Q. The questions that you intended to put to Mr. Bart were questions concerning some activity of the Communist Party or of Communism; right? A. Not necessarily.

Q. Well, were they questions related thereto? A. All questions were related to Mr. Bart's activities, but the committee did not have evidence in its possession that any of Mr. Bart's activities were directly related with the activities of the Communist Party.

Q. Therefore, your inquiry was to be of Mr. Bart generally? A. Yes, sir.

Q. Regardless of whether it had anything to do at all with the subject matter of the inquiry? A. The things that we were asking him about had, in our opinion, to do with the subject of the inquiry.

93

Q. Yes, sir. A. Communist activities on Mr. Bart's behalf, his own interest, and in the interest of the Communist Party.

Q. So the questions you were to ask had to do with Mr. Bart in relation to the Communist Party and its activities? A. It was alleged, but we had no evidence in all cases.

Q. In so far as your intentions in conducting the inquiry were concerned, that is what they were? A. Yes, sir.

94 *Donald T. Appell—For Government—Cross.*

Q. Did you have any idea as to what period of time you were going to inquire of Mr. Bart as to his activities? That is, what period?

Mr. Murray: Just a moment. I think counsel has pursued the witness far enough on what he did before the hearing. Just how he arrived at preparing these questions is, I think, immaterial, and I object to it.

Mr. Unger: Very well. Will Your Honor hear me a moment?

The Court: Yes, certainly.

Mr. Unger: There the question, I think, is proper
95 because the witness is put on the stand, and it would have pertinency and materiality, I think, throughout the cross-examination on that question.

The Court: The Court is not going to rule on the policy. The Court is going to rule on the individual question, now. Is there an answer to the question?

By the Court.

Q. You may answer. A. The procedure which the committee was to follow in the case of Mr. Bart was the same as the procedure in the case of other witnesses before him. We were interested in the time before the man became a member of the Communist Party up to and including the day he was before the committee as a witness.

96

By Mr. Unger.

Q. That was what you intended to inquire about? A. Yes, sir.

Q. His activities as a Communist? A. Yes, sir.

Q. From the time he became a Communist until the day the committee was inquiring? A. Yes, sir.

Q. Do you know of your own knowledge whether Mr. Bart had been advised prior to his appearance before the com-

mittee as to the nature of the questions that were to be put to him? A. Mr. Unger, I cannot be too correct in this without reviewing the records of the committee; but, as I recall it, Mr. Bart made a call to Washington, and he asked the purpose of the hearing, and I don't recall the advice that was given to him. I don't know whether he was advised or not, but I would say Mr. Bart knew well and did not have to ask the purpose for which he was being subpoenaed before the committee.

Q. You mean you would say, on the basis of your assumption, that Mr. Bart if subpoenaed to come before your committee would be examined concerning Communism; is that your point? A. Yes, sir.

98

Q. It is only in that general sense that you mean Mr. Bart would know what it was he was being called down here for? A. I don't recall when the committee had Marcel Scherer before it as a witness, but the question of the passport of John William Fox was the subject of that hearing.

Q. That was after Mr. Bart's. A. Then, he would have general knowledge, then.

Q. But you cannot say that he was advised by you or, to your knowledge, by any other member of your staff as to what the purpose of his inquiry was to be? A. In detail, I am sure he was not.

Q. Would you say it has been customary for your staff to advise or not to advise prospective witnesses of what they were being called for? A. We have advised many witnesses; but, by the same token, we have not advised others.

99

Q. As far as you know, Mr. Bart was not advised? A. Not in detail.

Mr. Unger: No further questions, Your Honor.

Mr. Murray: I just wish to develop further one question that Mr. Unger asked.

Redirect examination by Mr. Murray.

Q. Mr. Appell, you stated that you were satisfied Mr. Bart knew very well what he was called here for. Mr. Unger questioned you about that. Will you develop more fully why you would say that in regard to him?

Mr. Unger: Just a moment, please. I think the question is not proper. It calls for the operation of the witness' mind and is, therefore, not binding on the defendant.

Mr. Murray: I am pursuing a question asked on cross-examination.

101 Mr. Unger: Mr. Unger inquired as to the fact, which was specified. Mr. Murray is inquiring about the "whys"—the operations of the witness' mind. I think there is a difference between the two, and it is for that reason that I make objection.

The Court: The objection is sustained.

Mr. Murray: May I be further heard, Your Honor? I agree that the question is in regard to the operations of his mind, but I say it is proper redirect examination because it is pursuing what Mr. Unger himself had gone into.

The Court: Would it not serve your purpose to ask the witness what he did?

Mr. Unger: There is no objection to that.

102 Mr. Murray: It would not pursue the particular question that Mr. Appell was asked. He had said that he was sure Mr. Bart knew—the witness said he was quite sure Mr. Bart knew—perfectly well what he was being served.

Mr. Unger said, "By that you mean, from your assumption of the Communist activities, that he knew it in a general way, and that is all you did mean, isn't it"—something to that effect—and he said, "Yes."

I was proposing in my question on redirect examination to see if he did not have a further statement in regard to that.

The Court: You may ask him what his basis was for the answer that he gave.

Mr. Murray: Thank you.

By Mr. Murray.

Q. Will you state to the Court what basis, if it is in addition to what you have said, not otherwise? If you are satisfied with your answer, that will be all right. A. Mr. Bart was general manager of the Daily Worker, which is a publication printed by the Communist Party, and the Daily 104
Worker—the contents of the Daily Worker have been the subject of many hearings before the committee. The fact that he was general manager of the Daily Worker would be in itself sufficient reason to subpoena Mr. Bart as a witness before the committee.

Mr. Unger: I move to strike out the answer as not responsive to the question, and proving, I think, very plainly that it was not a proper question to start with. Really what the witness is telling is what was going on in his mind, and it is not responsive to whether Mr. Bart should have known why he was called.

The Court: Sir, you asked the question. This is on the same subject you yourself have initiated, so your 105
objection is overruled.

Mr. Unger: I think, Your Honor, that even when the field is opened by counsel, the rules of evidence as to whether a specific question then asked is proper or not still apply. I was merely contending that even though this field of inquiry is open to the witness and to Mr. Murray, each specific question he asks must still be bound by the rules of evidence. I have simply said he

was telling us what was going on in his head at the time. I am not able to pass upon that, nor is Mr. Murray. It is for that reason that the rules of evidence say that the operation of a witness' mind is something that is improper inquiry. I wanted to explain to Your Honor why I was objecting. My objection was not frivolous.

Mr. Murray: I am perfectly willing to have it stricken. I think it is partly my fault that the whole subject has taken so much time.

The Court: Since there is agreement, it may be stricken.

107 Mr. Unger: May I ask just one question?

The Court: Yes.

Recross-examination by Mr. Unger.

Q. When you prepared for your inquiry in the case of Mr. Bart, did you discuss the legality of prospective questions or groups of questions? A. There was no question, in my mind, which was prepared for the interrogation of Mr. Bart, which would be an illegal question.

Q. Therefore, I would assume that you did discuss it? A. I might not have; I don't remember, sir.

Q. Did you? A. I don't remember, sir.

Q. Did you as a practice discuss with your fellow investigators and members of the staff the propriety of ques-
108 tions from the point of view of the legality and constitutionality? A. As a general practice—and I assume that the practice was the same in the case of Mr. Bart—the questions are discussed by the investigators who prepare them with the general counsel prior to the hearing.

Q. Do you know whether there was any general rule that a question that was considered to be improper, illegal, or unconstitutional was not to be asked by the committee?

Mr. Murray: I object to that. I myself do not know what an unconstitutional question is.

The Court: The objection is sustained. As I tried to say a few minutes ago, these questions may be asked, even a question that is incriminating, and it is with the witness, whether the witness wishes to claim privilege or does not.

Mr. Unger: What counsel was trying to inquire into was whether the policy of the committee on this score had been defined; that is to say, whether it was possible to say, "We are not interested in whether the question is proper or not; we will just ask the question and then let a court pass upon it when it gets before the court." 110

I think it is important that the court determine and pass upon this, because then it would indicate whether these are really refusals to answer, or are simply, in fact questions which are either not pertinent, not material, or improper, because they raise issues which are unconstitutional and are challenged on that ground.

We could more easily find out from the committee than ourselves, because we know nothing except what is in the record here, what is the theory of the questioning by the committee. I think it is helpful for us to ascertain that, so that we can determine whether the questions are pertinent. The committee must have had some policy, unless it was one of those hit-or-miss policies of, "We will ask some questions, and maybe somewhere along the line we will strike a pot of gold, and that is fine; otherwise we will have them down here and keep pumping at them. Whether a question is legal or not is of no importance to us." 111

I say the question is whether the committee had a policy on that, and whether that policy was applied in this particular case. That was really all I intended to

ask the witness, if the witness knows, whether prior to the examination of Mr. Bart the committee got together and said, "Well, this particular line of questions is improper; another line is proper. We will confine ourselves to one and omit the other."

The Court: The Court sustains the objection as to that.

Mr. Unger: Very well. Thank you. I have no more questions.

The Court: Do you have any further questions, Mr. Murray?

Mr. Murray: I have no further questions, Your
113 Honor, no.

The Court: Then this witness may be excused.

(The witness left the stand.)

Mr. Murray: If Your Honor please, the Government has finished its evidence. The Government rests.

MOTION TO DISMISS THE INDICTMENT

Mr. Unger: May it please the Court: The defendant moves to dismiss the indictment upon the ground that the Government has failed to make out a prima facie case. Will Your Honor hear me in the argument on this question?

The Court: Yes.

114 Mr. Unger: As Your Honor appreciates, this is one of a series of cases of this kind that have come before this Court and before various other parts of this Court, arising out of citations by the Congress. They all come out of one committee, in the main, the Committee on Un-American Activities. All of them are of the same pattern.

I think it is important for the Court to consider why it is that such a deluge of these proceedings suddenly hits us, because I think it is correct to state that from the origin

of our Republic there probably have not been as many contempt citations in all the years as there have been in this one year that the Un-American Activities Committee has presented them to this Court. I think that is significant, and I think the reason for it has a great bearing in passing upon the questions of law I am now arguing before the Court. What I think is the basic reason is a substantial one.

We have become accustomed in all these years to look upon Congressional inquiries as being conducted in aid of legislation, and when so conducted we treat them in normal fashion and recognize that they have a proper function; and when so conducted, there usually is no conflict between the witness and the committee. I say "usually" because over the years that has been the case. It is only because of the experiences of this committee in particular that a change has occurred. That is to say, whereas the investigatory power of the committee for the purpose of aiding legislation has been the gravamen of committees heretofore, this committee has adopted an inquisitorial right, and it is because of the adoption of that policy that the committee finds itself so frequently in conflict with the witnesses, with the citizens, who assert certain constitutional rights. There is no other explanation.

It is perfectly obvious why that should be so. If a committee conducts itself on the basis that it has inquisitorial as distinct from investigatorial power, then it will be quizzing and inquiring in the same way that a grand jury does; and when it does that, it is perfectly understandable that it would come up against one or another of the protective provisions of the Constitution, especially those in the Bill of Rights, but not exclusively so, because I think it also comes up against the prohibition on the part of any branch of the Government to exercise or to assert greater powers than are conferred upon it by the Constitution.

In any event, as far as the rights of citizens are concerned, it is bound to come into clash with many provisions of the Constitution, particularly the First Amendment; the Fourth Amendment, on search and seizure; and the Fifth Amendment, the privilege against giving self-incriminating testimony.

I think it is perfectly understandable that those are substantive reasons why so many cases have come into the courts, which, to my mind, should never have been here, because it was never the intention of Congress, it seems to me, to have cases of this kind come before the criminal branch of the court. That is to say, it was not the intention
119 of Congress to make the provisions of Section 192 apply in cases of this type. It was meant to apply to those in which, when a committee of Congress is carrying on its normal investigating powers, a witness is contumacious, recalcitrant, and refuses to help—actually refuses to help and to cooperate for the purpose of carrying out the legitimate activities of the committee. Then he is hindering the processes of government, and he should be punished for it on the ground that he has refused to answer questions. But certainly not in aid of an inquisitorial function which a committee is carrying on, because then we come into the second deficiency that is produced by the action of this committee, and that is a procedural one. If this committee functioned in its normal manner, a procedural deficiency would never arise, because the committee would
120 never be asking the kind of questions which fall into the area of grand-jury investigations. But when it comes into this area, then a procedural question arises.

Your Honor understands that when one appears before a grand jury, and the grand jury in secrecy makes inquiry, and the witness raises objection to the inquiry on constitutional grounds, the grand jury, first of all, itself passes upon it and states whether, in its opinion, the question as put by the United States Attorney, or by the district

attorney in a State, is proper or improper, and thereupon directs the witness to answer. So the witness knows that, in the opinion of the grand jury, which carrying on its normal functions, he is required to answer.

Should he still insist upon and assert his constitutional rights, the grand jury cannot then act; it must then do something else. That is something which is procedural and which we understand to be due process. The grand jury must bring that person before a judge invested with the power of making judgments; vested with a knowledge of the law; who will be able to take the Constitution and the law and judge the matter in accordance with the authority conferred upon the judiciary. The grand jury must 122
present that question to the Court, and the Court will then pass upon the propriety of the objection.

Again, the witness has the opportunity to say, "I still disagree with the Court"; then taking the consequences of his refusal to answer.

But, in any event, he then is apprised, as fully as law can apprise him, that he has a duty.

That procedure, which is so carefully safeguarded in the province of the grand jury, which has inquisitorial powers, is completely missing in the carrying on of investigations by the Un-American Activities Committee and by Congressional committees generally. But, as I have indicated, that is not serious in other cases; it has been made serious by this committee.

This committee, going on its blithe way, performs the 123
function of an inquisitorial body in the nature of a grand jury, as you may have heard from the witness' mouth here, but provides none of the safeguards of a grand jury. A witness comes before the committee, a question is asked, and colloquy ensues. One never knows whether the committee is satisfied as a result of the colloquy or is dissatisfied. One never knows whether the committee is satisfied with the reasons or dissatisfied with the witness'

reasons. One never knows whether the committee wants a witness to answer or does not want him to answer. One may suspect, one may infer, but one never knows. One never knows what the inquiry is about.

In fact, as Your Honor heard from the reading of the record, the committeeman himself—the chairman in this case, Mr. Walter—said, "We don't know what this is about at this point. We will find it out as we go along here."

Therefore, it is perfectly understandable that procedurally we find ourselves in a peculiar situation. A witness proceeds to the best of his ability to debate a question with the committee. He gets through with that
125 debate, and there he is left high and dry. He can leave that committee room with a conviction that what he has done there has been perfectly proper and acceptable—not only proper but acceptable—to the committee. He can awake three months later to find that it was not so acceptable to the committee. I say it is that procedural situation which is of great importance here.

As a matter of fact, were we protected by the same procedural due process as is afforded us in the case of a grand jury, we would never have a case like this. We certainly would not have had fifty cases burdening the Court, because it would have been clear on argument that a committee is either satisfied with the answers, or else the witness would have been told that the committee is dissatisfied, and then would have been able to reconsider and decide
126 whether he wished to answer the question Yes or No, or whether there was a genuine refusal.

Secondly, we would have known in advance whether the committee considered the question of self-incrimination or did not consider it; or whether it passed upon it.

But this committee makes clear from the testimony that has been read here that it does not rule on objections. Does Your Honor remember the statement made by the committee chairman—"We do not rule on objections; we just

go on"? That is to say, "If you want to make an objection, make it." Well, that becomes a game, and I do not think the criminal law can be based upon that. A man cannot be threatened with imprisonment for even one minute based upon a game as to whether he is guessing right or as to whether his judgment on a particular question of law is correct or incorrect.

That is the status of the record presented to this Court. That is to say, Mr. Bart comes before the committee in the atmosphere I have described. He knows nothing about what is going to happen, except as Mr. Appell has indicated. He knows generally what the committee is up to here. In his opinion, it is up to mischief with reference 128
to himself, the general manager of the Daily Worker. Mr. Appell has told you what he thinks about that. Therefore, he knows that they are not going to inquire. What they are inquiring about, he has not the faintest idea, but he knows generally they are going to ask him many questions, and he knows that generally those questions are all going to be questions which can threaten his safety, his freedom. Generally, he knows that.

Well, he comes before the committee, and he does not simply say, "Well, now, look: I am telling you now that I am going to say 'Fifth Amendment' to every question."

In all fairness, he attempts to indicate that he is behaving in a reasonable manner, recognizing the committee's right, even though expressing very, very sharp disagreement with the committee's intentions—recognizing the legal 129
right that the committee has in proceeding to act there.

Some questions he answers; some questions he does not answer. Some questions he proceeds to debate with the committee; some he does not debate. That is what happened here. As to the matter of refusal to answer, I insist that there was not a single refusal to answer a question in this case—not a single refusal. Therefore, the Government has failed in its obligation to establish that preliminary allegation, a refusal to answer.

What happened here was that the witness, in the course of colloquies, as we shall consider in a few minutes, expressed his views with reference to what the committee was inquiring into concerning his father at the time when he came here, when he was an eight-year-old child, and so on; and the committee was batting it back and forth with him—members of the committee and Mr. Tavenner himself. Thus it went on.

Is there any doubt that there was no gap, no void, here, in the sense that they did not know who this man was? In other words, is there any doubt that he was not hampering the investigation? There is no doubt that he was not. They
131 knew he was not. He had told them when he came to this country. He told them he had had his name changed legally and so on.

When you have all the questions in that area, you have a complete picture of who this man is. That he is the man they wanted, there is no dispute. He is the man they intended to question. There is no dispute about that.

There are a lot of arguments or colloquies which are used by the committee as devices of one sort or another. The first six questions are all devices for getting some basic information, and nothing else. They tried to entrap the witness to say what he did not want to discuss with them. They finally dropped it, and they let it go on, having got out of him everything they wanted—who he was, who his wife was, when he changed his name, where he changed his
132 name, what his name is, what his middle initial is. You can't say that that is a refusal to answer. On the contrary, as a matter of fact, he said, "I am not refusing to answer." Or I don't remember whether it was he or I who said that. That is the truth.

In any event, that does not present a case of refusal to answer as is contemplated by Congress, although you might say that a person may be held for criminal charges, because certainly it will not be argued by Mr. Murray or anyone

else that on the basis of this group of questions we have the dignity of a criminal charge. That is de minimis, if I have ever seen it. That is almost like having a little argument between Mr. Murray and myself as to—well, I don't know—as to what I think about changing names here. Oh, almost any personal question—what I think about the City of Washington, or some personal opinion I may have concerning any individual. I think its gravity is de minimis under the law.

Certainly it cannot be said here that this committee considered that these questions were the pertinent and material questions that they had to have answered, the failure to answer which they insist requires that a man be brought to 134
trial in a criminal case. That cannot be.

Therefore, we come to the point that these questions cannot in such context, and this examination generally, be considered pertinent and material. I might put it this way: If the witness came before the committee and refused to answer questions about himself, and every time the committee asked a question, the witness refused, and the committee had to drop it, because they said, "He does not want to answer," then clearly, in such a case, the committee would have a right to come before the Court and say, "This man has been in contempt. While it is true these were only preliminary questions, we could not get on until we passed the preliminary part."

But that did not happen here. They certainly got on. They got on very nicely. They left this area. They were 135
not hampered by his questions or by his colloquy in the slightest degree. They went right on. They went to the essence of their examination—what Mr. Appell was talking about—in a whole series of questions, which represent the overwhelming majority of the questions and answers contained in the hearing. Therefore, you cannot say that this constitutes refusal to answer a pertinent, material question.

Then, finally, we come to the question of self-incrimination. I think it was very proper; I do not want to laud Mr. Murray for having withdrawn the counts which he did. I think he simply was doing his duty in so withdrawing them. But, of course, by withdrawing those counts, he does not blot out the nature of the whole indictment, because very plainly what happened here was that a whole series of questions were being asked, concerning which the Fifth Amendment was applicable; that is, that a man was being asked to testify against himself. Mr. Murray can't say, "Well, I am going to go at this point. I am going to select questions that I want and say, Now, this he should answer, because he
137 answered a previous one," because in logic he could just as well argue, Well, since he answered one, he has got to answer right up to Number 30."

That does not make sense. His refusals to answer questions upon the ground that they were self-incriminatory were based upon the fact that each one of the questions he refused to answer would in fact tend to incriminate him. That another question which he may have answered in the past may also have tended to incriminate him does not mean that from that point on he is required to answer all questions. That kind of construction of the Rogers case would be to reduce it to an absurdity; would be to make an outrageous decision of it. All that the Rogers case held was that when a witness has in fact answered as to facts—material facts—he may not refuse to disclose the details of
138 those facts; that is all.

The Court: Why is that not the case here, in this question: In a question here the witness answers—I can't find the place, but the witness answers——

Mr. Unger: Well, I think——

The Court: (Continuing) that he was an official in the Communist Party.

Mr. Unger: That is right.

The Court: He answered that without a claim of incrimination. Then subsequently he was asked about other people who were in the organization at that time. As to those other people, he claims the doctrine of the protection of the Fifth Amendment, but he had not claimed it as to himself previously.

Mr. Unger: That is right. Now, if Your Honor please, you can't cut No. 7, No. 8, or No. 9 from the others—all thirty-two—I contend, because all of them thereafter are either good or bad on the theory that the answers might tend to incriminate him—all of them. I contend that No. 8 is no different from No. 9, No. 10, No. 11, or No. 12 in that the answer might tend to incriminate him, and that is all that I am required to establish.

The fact that No. 7 might also tend to incriminate him, and that he answered it, does not alter the situation, because No. 8 is a new and a different question; it is not simply an appendage of No. 7. It is a new and different question that might raise the issue of conspiracy. I know the Supreme Court considered that question in the last sentence. It may raise, Number 2, a new crime or crimes of seditious conspiracy, that have nothing to do with the Smith Act. In short, it may raise any questions of conspiracy with reference to the use of funds; it may raise questions with reference to conspiracy; or with reference to any subject at all on the question of the Smith Act.

The Supreme Court in the Rogers case held as it did only because the witness having answered a series of questions concerning her membership—that is to say, the position that she held—the filling in of the details of that could no longer create a new crime; it could only help to establish the old crime.

Now, Justice Black, in fact, made the point that even that is important. But keep in mind that that was the dissenting opinion. Let us rely upon the affirming opinion. The prevailing opinion holds only when the things that are

being refused are details which simply fill in the incriminating facts. May you not withhold them? No, because once you have incriminated yourself, no new incrimination can be accomplished. No new incrimination can be accomplished by new questions. Then you must answer.

But certainly Mr. Murray will not deny that there can be a new incrimination by reason of the questions put to the witness in this case. Proof of that is given by your Honor's reading the other questions which Mr. Bart refused to answer. In other words, they throw light on the numerous possibilities that can exist. Passport fraud. They apparently raise that question. You will recall the
143 question about the Lenin School and the question of funds raised for it. That opens the door to incrimination for another crime.

For that reason you cannot say that his answering one question, even if it should be incriminatory, thereby deprives him forever after of his protection of the Constitution. I think that is the only healthy position to take on this question. Otherwise we come to this rather regrettable position that we officers of the court say to a prospective witness, "The position you should adopt, Mr. Witness, is, Better say nothing. Never say anything. Because the moment you say anything, we officers of the law are going to hold that you are required to say everything."

I do not think that your Honor intends to construe the law in that fashion. My interpretation of the law indicates
144 that it is intended to do two things: one, to give to a committee the power to ask proper questions, to encourage witnesses to answer those questions, and not to refuse to answer for fear that if he does answer one he is going to get himself into trouble on fifteen more; and two, to give to the witness the right to exercise the constitutional protection of the Fifth Amendment, when a question calls for the exercise of that right. Each of these two rights have to go hand in hand—the committee's power to inquire; the

witness' right under the Constitution. If we have those things going hand in hand, we have no injury to either. Then it is possible at each point along the way to say that the fact that a witness did answer a previous question did not indicate an intention on his part to waive privilege.

The Court: He does not have to waive it; he must assert it if he claims it.

Mr. Unger: Correct. In the case of the question he answered, he obviously has raised no questions, nor is the committee challenging him here. I say as to that question he may have had the right to assert privilege to the question he answered. The fact that he gave up that right does not mean that he thereafter waived when he did assert the right.

Remember, your Honor, that he did assert the right in the question that you asked about, and the only reason you can take it away from him is that you construe it to be a waiver, even though he asserted that right. Isn't that so, Your Honor? Remember the question Mr. Murray referred to, and which your Honor read, is a question where the witness asserted privilege. He did not say nothing; he said, "I assert the privilege against self-incrimination"; and the only reason that Your Honor can reject it is on the theory that he waived it by answering a previous question, and it is to that which I have been addressing myself. He did not waive it, because he did not proceed to give all the incriminating facts in previous answers. He knew the simple necessity of withholding details, as in the Rogers case.

What he did was, in one case, to answer a question. It may have been incriminating; quite true. I concede that, Your Honor. It is very possible that I should have advised him to refuse to answer question No. 6, the very first question. Certainly I could have done that.

I could have said, "You don't say one word. All you do is go in there and say, 'Fifth Amendment; self-incrimination'; and you are as safe as if you were in your little bed."

But I did not give him that advice.

I said, "Go in and answer questions—those questions which the committee has a right to ask you—and refuse to answer those questions which the committee has no right to ask you."

I suppose, as a matter of fact, he answered one question which he could have refused to answer. I think Mr. Murray will concede that had he refused to answer it, there would have been no problem concerning that question. But does
149 that mean he forfeited, he gave up, he waived consciously and intentionally his right to the protection of the Fifth Amendment? It cannot mean that. That is why I say the Rogers case does not apply here. It is simply not applicable to this situation.

That was a case in which after a series of questions were answered, more questions were asked concerning details of the previous ones. The witness refused to answer those questions, and the Court said, "You can't withhold details once you have answered the incriminating question, because then you are no longer incriminating yourself. You have already incriminated yourself."

You cannot say that Mr. Bart had already incriminated himself as to the question he refused to answer. That is out of the picture. Therefore, I say the fact that he an-
150 swered one question here does not take away from him his constitutional right. The best proof that that is so is the fact that Mr. Murray is waiving all counts from No. 11 to No. 32, although he could just as well and just as logically have argued that Mr. Bart having answered the first question, that he was employed in the Communist Party, he should be compelled to answer everything else. All they are talking about is Communism. That argument would be clearly logical.

The protection of the Fifth Amendment is a whole and complete protection. Therefore, I say, if Your Honor please, that I think Mr. Murray's concession as to all of these is actually a concession as to every one of these questions. Every one is improper because it is banned by the protection accorded to the witness against self-incrimination—every single one of them, from No. 7 down.

I should like to make a further argument on that question: that as to some of these questions I think, if Your Honor reads the examination, you will see that there was no refusal. Take count 7. In count 7, here is what takes place. Let me read it to you briefly.

"In addition to your position as general manager for 152
this organization, do you hold any other position from which you receive a salary or gratuity?

"Mr. Bart: I do not.

"Mr. Tavenner: Will you briefly summarize for the committee other positions which you have held and from which you have received a salary or gratuity, prior to the position you now hold?

"(Witness confers with his counsel.)

"Mr. Bart: It is evident that in these questions a newspaper is involved, and I shall not answer because I feel that this committee, if it proceeds with this kind of questions, is infringing on the First Amendment of the Constitution of our country, freedom of the press, and I shall not be a party to anything of that kind. 153

"Mr. Tavenner: That is the ground upon which you refuse to answer the question as to what positions you have held prior to your present position?

"(Witness confers with his counsel.)

"Mr. Walter: Did you ever hold any positions other than positions with newspapers?

"Mr. Bart: I did."

Clearly that question merged with the next one, and it was answered. So, again, I go back to the original part of my argument. You do not have refusals to answer here. What unfortunately has happened is this: Wherever there was a question—wherever anywhere in this record there was a question—to which it did not appear that there was a direct answer, that was cited. That is all. I do not think the Government makes out a prima facie case either of pertinency or materiality or of refusal to answer simply by coming in and saying to the Court, "Here is a question. There is a blank after it; therefore, there is a constitutional refusal to answer." If the Government were to take that
155 position, then it would follow that this Court would have no judicial functions at all; it would simply be an administrative agent. All that would have to happen would be for the Court to look at this and say, "Yes, it is true that this question:

> 'Will you briefly summarize for the committee other positions which you have held and from which you have received a salary or gratuity, prior to the position you now hold?'

does not immediately thereafter have an answer."

That is true. It does not mean that it was not answered, because in some other manner it was answered. Mr. Walter
156 asked him a different question by rephrasing the previous one and got an answer to his question.

Therefore, it seems to me that the Government has failed to meet the burden which it has to establish, that there was, in fact, a refusal to answer—No. 1; that there was, in fact, a refusal to answer a question which was pertinent or material—No. 2; and that there was, in fact, a refusal to answer a pertinent and material question which the witness had to answer because it was not protected by the Fifth Amendment—No. 3.

In view of the Government's failure to establish these three principles as an issue of fact, I think the Government has failed to make out a prima facie case.

I think the law on this question is quite clear, and I think that the precedents of the courts, and of other courts besides this, have made it very plain that this court will not submit to simply having the law, Section 192, treated as if it were nothing but a directive to a judge to sit and find people guilty because of their exercise of their rights.

I think, therefore, that this Court should hold, and that it will be very salutary that it should hold, that this witness behaved in a normal manner, engaging in colloquies, if you like, with perhaps some acrimony between counsel, for 158
which the defendant certainly could not be burdened—certainly nothing more than any human being would have done—that he had a right to assume that the questions which he did not answer, the committee did not insist upon his answering; that there was, therefore, a waiver of those answers by the committee; and that, therefore, there is nothing before this Court at this time upon which a *prima* facie case has been made out.

The Court: Mr. Murray, with reference to count 7, the witness was first asked to summarize the positions that he had held. He said that he felt that that was an infringement of the First Amendment. But subsequently the same question was put:

> "Did you ever hold any positions other than positions with newspapers?" 159

It is not exactly the same question, but the purport is the same. Then, the witness further down says:

> "I was organizer and head of the Communist Party at different times, in different years."

Why is not that an answer to that question?

Mr. Murray: Because that question did not involve a newspaper, as the indictment question did. The point is that he had already shown an unwillingness and refusal to answer, to give that part of his answer which related to a newspaper. He was then asked this question:

> "Did you ever hold any positions other than positions with newspapers?"

He said: "I did."

> "Mr. Walter: What were they?"

The witness then said or told what they were. He still
161 refused to tell about the newspaper positions. That was inclu[illegible] as his own interpretation shown in the original question to summarize the other positions. He said:

> "It is evident that in these questions a newspaper is involved, and I shall not answer * * *."

The Court: Yes, I see. That one is proper, then.

What about this question No. 1? He does not seem to have refused to answer that—at least, not before question No. 2 is reached.

Mr. Murray: He did not answer it, Your Honor. I admit the subject had not been exhausted, because the very next question is a pursuit of the same inquiry. As a matter of fact, I take it that probably the first six questions
162 were made necessary, and the other questions for that matter, intervening, which are not the subject of any count in the indictment—were made necessary by his refusal to give the information. I would agree with Mr. Unger that questions 1 to 6, inclusive, all are attempts by the committee to get the same information.

He never told the committee whether he was born under the name Philip Bart or not. I think it is implicit in his later testimony that he probably was not, but he never did

163

answer that question. On the other hand, he did not in so many words say, "I will not answer it"; but before he got to that point, the questioner went on to the next one:

"When did you take that name?"

meaning Philip Bart.

Does that answer Your Honor's question?

The Court: Yes, that answers it.

Mr. Unger: Will Your Honor hear me half a minute on the point Your Honor raised? Maybe I am pressing it harder than Your Honor wants me to, but here is the picture. That very question you asked is the eye-opener to the whole thing.

164

Here is a counsel who asks a question of a witness:

"Will you briefly summarize for the committee other positions which you have held and from which you have received a salary or gratuity, prior to the position you now hold?"

So the witness said:

"It is evident that in these questions a newspaper is involved";

that freedom of the press is involved and that the First Amendment is involved. That is his answer.

Says the counsel to the witness, "Is that why you are refusing to answer the question—because there is a newspaper involved; because freedom of the press is involved; because the Constitution is involved?" That was the question. 165

The Chairman, like a judge, interposed at that point and took the thing away from the counsel. He asked the question this way:

"Did you ever hold any positions other than positions with newspapers?"

I ask your Honor if that is not a signal to me, a lawyer sitting here, or to the witness, if that is not a notice to him, that the previous question has been withdrawn. Here is the chairman of the committee framing his question in such a way as to take into account the fact that the freedom of the press objection is noted and, in fact, respected by the committee. Yet the Government says that does not matter.

Now, you see the point I made before. You don't have a refusal to answer here. That witness is in a very, very
167 outrageous position, under those circumstances. To threaten the man with criminal charges on the basis of a situation of this kind, which is in the control of the committee, is to my mind to make a man who comes before a committee actually subject to punishment from the minute he sits down. He then is subject to entrapment at any time, because if when he enters into this discussion he comes out with the conclusion that the committee chairman actually honored his objection, and answered a question the defendant put to him on the basis of that, and he walks out and goes home saying, "That was fine," and he thereafter, whenever the Government so chooses, can be indicted, then I say we are in that area where due process is impossible; and, as I explained to Your Honor in my opening remarks, the reason for that is the failure of the committee to set up
168 those procedural safeguards, those standards, which would make it impossible for a witness to be in any doubt as to whether he was doing something wrong or something right. That is the least a man is entitled to before he is held on a criminal charge. He must at least be put on notice when this thing happened. This is the epitome of the objection that I make; also, the failure of procedural due process on the part of the committee as to this question. Other questions are of the same nature. There may be some debate

as to whether they are a little clearer. But, in any event, I am going to tell you that even if I were a witness, I would have come to the same conclusion. I would have drawn the conclusion that the chairman had honored my objection and had gone on. Yet I would have been clearly at the mercy of the committee's judgment thereafter whether to hold me in contempt. That goes for every one of these questions.

If they had done, at least, as they do before a grand jury—in other words, if there was procedural due process—there would not be these questions before us at all. Mr. Murray would not have dared to come into Court with thirty-two counts and knock out twenty-two of them just like that. That is not right.

That is what happens. A grand jury finds itself in this 170
position. You come before them with these questions and a blank as an answer. There is no doubt but that the only choice a grand jury has under the law is to return an indictment.

This can go on indefinitely. You may have had 150 indictments on 150 questions. That is something I think the law abhors, because it is not the law. It is no longer the law. It is the subjective reactions of members of the committee. It is the subjective reaction of whoever it is decides to bring this before the grand jury.

For instance, it is entirely possible that the committee could set down these questions and say, "Oh, well, we don't want to cite Mr. Bart. We will let this go."

There would be no indictment. 171

But the law is more certain than that. A man must know in advance. That is what we mean when we say that ignorance of the law is no excuse. The law says so. If you don't answer those questions, if you refuse to answer questions which are pertinent and material—if you refuse to answer; not merely do not answer; the law does not say, "No, it is not necessary that you refuse to answer"—the man must know and say, "I refuse to answer. I do so con-

sciously and intentionally; therefore, I will be subjected, and I will take the risk."

But under these circumstances the Government has failed to prove refusal to answer, and Your Honor, I think, has very helpfully singled out and supplied the perfect example of how a question which is not answered, nevertheless is not refused an answer.

I think Your Honor has indicated here what is the fault, the actual faral defect, of the entire indictment, from count 1 right down to count 32—every single one of them. That is beyond and above the other objections that I have made to Your Honor about the indictment, but that one alone. I
173 think it would be very helpful if Your Honor were to write an opinion on that one question, which would give to the committee a very helpful indication from the Judiciary as to what it is necessary for the committee to do in order to provide procedural due process, so that this court does not become a shambles in the sense that you do not have fifty, sixty, or seventy indictments on this sort of thing coming into court, just to be thrown out. There is no reason for it.

I think it would be very helpful if the committee were taught that procedural due process is as important as substantive due process; and that if it intends to go ahead with this method, it has to set up standards of procedure whereby a witness knows, by direction of the chairman or by direction of the Congress, if necessary, that when he does not
174 answer a question, the committee wants an answer and, therefore, tells him, "You must answer it."

That is the least that should be required of the committee before it asks a judge to hold that a man is a criminal.

The Court: The motion is denied.

Mr. Unger: I respectfully except, Your Honor.

May it please the Court: The defendant wishes to call no witnesses, believing that there is no issue of fact here, unless we can get the guidance of the Court.

Your Honor thinks an issue of fact has been raised in the case? 175

The Court: Yes.

Mr. Unger: Your Honor thinks an issue of fact has been raised?

The Court: Yes.

Mr. Unger: May I ask the Court in what respect——

The Court: It is for you to put your case on, if you wish to put on your defense.

Mr. Unger: Well, may we approach the bench?

The Court: Yes.

(A bench conference was then held between the Court and counsel, but was not recorded. The following then occurred:) 176

Mr. Unger: I shall repeat what I have said before: The defendant wishes to call no witnesses, and the defense rests.

Mr. Murray: There will be no rebuttal, of course.

Mr. Unger: Therefore, we are ready, if Your Honor please, with a motion to dismiss. Does Your Honor wish to hear me now in a formal motion?

The Court: Yes. How long will you take?

Mr. Unger: Just a few minutes. I shall not be long. What time does Your Honor normally recess?

The Court: We usually recess at twelve-thirty.

Mr. Unger: Then, will Your Honor return?

The Court: Oh, yes, we will go on in the afternoon session.

Mr. Unger: Perhaps we had better recess, then. 177

The Court: Do you think you will take longer?

Mr. Unger: Yes. Then we won't be pressuring Your Honor. It is only five or seven minutes from now. However, I have no objection to going on now, and then, if necessary, Your Honor, we will go on this afternoon. I think I shall be brief.

178 *Motion to Dismiss the Indictment at the Close of the Case.*

Motion to Dismiss the Indictment at the Close of the Case

Mr. Unger: I move, if Your Honor please, for the dismissal of the indictment and the discharge of the indictment at the close of the case, now, upon the ground that the Government has failed to prove the defendant guilty beyond a reasonable doubt.

We have a new measure of proof at this point, as Your Honor, of course, appreciates, so I think it is correct for me to contend that the Government has failed to meet its burden of proof. The fact that the defendant has called
179 no witnesses does not alter the nature of the burden of proof for the Government, and therefore I make my motion now upon the ground that the Government has failed to prove that the defendant is guilty beyond a reasonable doubt. That is what is required to be proved, even if they may have proved a prima facie case. At the close of the Government's case, the Government has not proved the defendant guilty beyond a reasonable doubt.

What was it necessary for the Government to prove beyond a reasonable doubt? That there was, in fact, this refusal that we discussed before in the preliminary motion; and that there was not, as the record indicates, and as I believe the Court must infer, simply a non-answer; that is, that there was a colloquy between counsel and the committee, between the defendant and the committee, and be-
180 tween the defendant and the committee counsel, at the end of which the committee proceeded on its way.

In proof of that is the fact that at a certain point Your Honor will notice that the committee said, "We are going to close the hearing. You are excused." Yet the committee sat right on and continued to ask questions just as calmly as if it had not excused the defendant. In proof of that is the fact that the committee went right on, unhampered by any of the colloquy, and proceeded to ask questions exactly

as if they were perfectly satisfied with the arguments raised by the defendant or his counsel. It is proof positive that the committee did not construe the action of the defendant as a refusal to answer questions.

The second argument that I make is that we have conclusively shown that certainly the Government has not established that the defendant waived the privilege against self-incrimination as to counts 7, 8, and 10. As to counts 1 to 6, Mr. Murray has made it very plain that the Government has nothing; that that is simply the same question in six different ways, each one a more imaginative way of trying to ask the same question, but it is not the same question.

As to counts 7, 8, and 10, if Your Honor please, we have 182
proved conclusively that these questions could have been answered and subjected the defendant to self-incrimination; therefore, the questions were improperly the basis for indictment.

I think the cases, which I should be glad to cite in the form of a brief to be submitted to the Court, clearly hold that where new questions would tend to further incrimination, then the fact that the witness has, consciously or not, willingly or not, answered other questions cannot constitute a waiver of the right or the privilege; and secondly, that the waiver of the privilege must be a conscious, intentional, deliberate, express waiver. That is absent from this record too; on the contrary, there is nothing to indicate here that the defendant waived his privilege. 183

The Court: Sir, the decisions say just the opposite. The Supreme Court time and again has held that you must claim privilege in order to assert it. Not that it must be clear that you have waived it, but it must be clear that the self-incrimination claim is made.

Mr. Unger: If that is so, if Your Honor please, as to counts 7, 8, and 10, I should like to read for the record, very, very briefly, as to No. 7

The Court: Before you go to No. 7, where, Mr. Murray, is the refusal to answer question 10?

Mr. Murray: I have to admit that there isn't any, your Honor.

The Court: Well, would you like to withdraw that?

Mr. Murray: Yes. Yes, I do withdraw that, if the Court please.

Mr. Unger: Now, permit me to refer to question 8, Your Honor:

> "Who were the other officials of the Ohio section of the Communist Party during the period of time you were organizer there?"

185

Mr. Murray: I might say, if you do not mind my interrupting, that 10 is a modification of 8.

Mr. Unger (Reading): "I will not answer it, standing on my rights * * *."

That is No. 8. It is at——

Mr. Murray: The bottom of page 2638, Your Honor.

Mr. Unger (Reading): "Mr. Tavenner: Who were the other officials of the Ohio section of the Communist Party during the time you were organizer there?"

> "Mr. Bart: I object to this question. I will not answer it, standing on my rights in accordance with Article V of the Constitution, and furthermore I protest because this committee has asked this question of
> 186 numerous people and has infringed upon their rights as American citizens."

He does assert affirmatively.

The Court: Yes, but the decisions of the Supreme Court hold that if the statute of limitations has run, the witness must answer even though it incriminates him.

Mr. Unger: There is nothing with reference to this question, if Your Honor please, to indicate that the statute has run.

The Court: Just up above that, the other questions that he answered indicate when that was.

Mr. Unger: But, if Your Honor please, while the statute of limitations might apply with reference to him individually, with respect to this, a continuing conspiracy could go on fourteen years and might go on for twenty-eight years. There is nothing to indicate here that that is not what they are interested in.

On the contrary, if you will recall, Mr. Appell testified here that they were interested in everything from the first day right to now. Why is that? Because there is a possibility of a continuing conspiracy. Therefore, this question is in that realm. 188

Now, surely, Mr. Tavenner is trying to say—I won't say he is doing it maliciously—he is trying to encourage the witness to answer questions, so he says to him, "But look. There is the statute of limitations." Is he trying to say by that question——

The Court: What was the date of the Smith Act?

Mr. Unger: Nineteen forty, if Your Honor please.

The Court: This would be at a time even previous, then, to the Smith Act.

Mr. Unger: But if the conspiracy continued after the passage of the Smith Act—if the conspiracy began in 1936 and continued beyond 1941—then the Smith Act would apply. 189

That is so, Mr. Murray; is that not correct?

Mr. Murray: Yes. But perhaps I had not better say anything more. Yes, there can be a continuing conspiracy.

Mr. Unger: Yes. Therefore, that is the situation you are confronted with. I think Mr. Tavenner was in error. I won't say his motives were evil. He was in error in mak-

ing the reference to the question of statute of limitations, because he knows that there are other crimes besides personal crimes concerning which there may be an applicable statute. He knows that. Therefore, he should never have made that remark, because it is misleading.

It is misleading to all of us when that kind of remark is made, unless it was the intent to show that the defendant had full immunity. But the courts have held that the defendant does not have full immunity. That is not the basis upon which we operate.

The Court: In this case, this man has answered and said:

191 "I was organizer and head of the Communist Party at different times, in different years."

Then he goes on. He has answered about himself.

Mr. Unger (reading):

"Mr. Bart: I do not know the exact period of time you mentioned. It is fourteen years ago."

The Court: Yes, he admits it as to himself. Having gone that far, the question is whether he could refuse then to make an answer about somebody else who was in the Party.

Mr. Unger: But he is not refusing to answer about somebody else with reference to the protection of the Fifth
192 Amendment for that somebody else. What he is being asked to do is follow—if Your Honor will turn a page back, you will see this:

"Mr. Tavenner: The Daily Worker of March 28, 1936"—

that is fourteen years back—

"shows you to have been a section organizer for the Communist Party in Ohio. That is correct, is it not?"

That is a statement of fact that is made by Mr. Tavenner.

"Mr. Bart: Most likely.

"Mr. Tavenner. Well, you know whether you were a section organizer for the Communist Party in Ohio, do you not?"

Thus far we have no answer to that.

"Mr. Bart: I do not know the exact period of time you mentioned. It is fourteen years ago."

Meaning 1936, the date Mr. Tavenner was talking about there. Thus far the witness has said nothing about himself.

"Mr. Tavenner: Who were the other officials of the Ohio section of the Communist Party during the period of time you were organizer there?" 194

At that point Mr. Tavenner is talking about other officials. So Mr. Bart has a right to say, "This man is trying to compel me to incriminate myself in a conspiracy between me and some other people. That is what he is trying to have me do. Therefore, I must be alert to that."

Therefore, he raises the question of the Fifth Amendment. That is what happened here: nothing more than that. So he did raise it. He did not non-raise it.

I think, if Your Honor please, that this is, again, simply a case where a man raises the protection of the Fifth Amendment when he thinks the time has come in the course of interrogation for him to do so. 195

You are not going to tell him—you are not going to say to him—"Now, look: You have raised it seven or eight questions back"; because, as I said before, if we are going to adopt that line of reasoning, then we are really going to discourage witnesses from testifying.

In fact, we are encouraging them to say, "Oh, I had better not say a word, because the moment I say one word, some committeeman may say, 'You have got to say everything,' and some judge may agree with him." I do not think that is the law.

The Court: At this time the Court will recess until two o'clock.

(At 12:34 P. M. a recess was taken until 2 P. M. of the same day.)

AFTERNOON SESSION.

(The trial was resumed at 2 P. M., upon the expiration
197 of the recess.)

The Court: You may proceed.

Mr. Unger: I shall be very brief. I shall address myself to one point concerning two counts, and then I will ask Mr. Wright to talk, very briefly, about one other series of counts.

I have only counts 7 and 8 that I should like to turn the Court's attention to, if Your Honor will refer to the testimony, the page number being 2638, which Your Honor referred to before.

The Court: Yes.

Mr. Unger: It goes somewhat as follows:

"Mr. Tavenner: Will you briefly summarize for the
198 committee other positions which you have held and from which you have received a salary or gratuity, prior to the position you now hold?"

That is No. 7.

Then, Mr. Bart raises the objection of the First Amendment, as to the freedom of the press. Mr. Tavenner then says:

"That is the ground upon which you refuse to answer the question as to what positions you have held prior to your present position?"

Then, Mr. Walter, the chairman of the committee, intervenes before any answer is given and phrases his own question:

"Did you ever hold any positions other than positions with newspapers?"

To that Mr. Bart does answer:

"I did."

200

Then, Mr. Bart answers the question as follows:

"I was organizer and head of the Communist Party at different times, in different years."

I contend, therefore, that question 7 was answered by the nature of the examination that was conducted. But what follows from that? Question 8—count 8 in the indictment—which is referred to on the very next page, follows logically from this one. He has answered a question concerning what jobs he held; that is to say, what positions were held, concerning which he received a salary or gratuity, and he answered in that way. From that point on, the committee goes off into the aspects of the Communist Party, concerning which Mr. Appell has spoken to us here 201
today.

It is at that point, for the first time, that he asserts privilege. Mr. Tavenner says:

"The Daily Worker of March 28, 1936, shows you to have been a section organizer for the Communist Party in Ohio."

That is a statement; that is not a question.

Mr. Bart says:

"Most likely."

The Court: There is a question. It says:

"That is correct, is it not?"

Mr. Unger: Oh, yes. Technically that is correct. I really implied by that that this is an assertion which is not treated as a question until we get to the following question:

"Mr. Tavenner: Well, you know whether you were a section organizer for the Communist Party in Ohio,
203 do you not?

"Mr. Bart: I do not know the exact period of time you mentioned. It is fourteen years ago."

That would be March 28, 1936, you will remember.

So at this point we still have no answers to anything. Then we have the following:

"Mr. Tavenner: Who were the other officials of the Ohio section of the Communist Party during the period of time you were organizer there?"

We are now no longer in the area of his employment for a salary or gratuity; we are now in the area of "What were you doing?" and things that were being done. Here, for
204 the first time, the witness testifies that his constitutional rights have been invaded, and he asserts privilege.

Your Honor will note that nowhere does the committee reject that claim of privilege. Nowhere does the committee say, as the court requires that it do say, "We reject your privilege and insist that you answer the question."

Your Honor will recall the case decided by Judge Pine in this District, United States v. Eisle, in which the S. E. C. was involved. There the court said:

"It was the examiner's duty, when the defendant claimed this privilege, to determine from the character of the questions asked and the circumstances of the inquiry whether there was a likelihood that the answers might be incriminating, and if there was such a likelihood, it was his duty to determine whether he wished to exchange immunity for testimony."

No such thing transpired here. Here we have this situation: First, question 7 is answered to the satisfaction, apparently, of everybody. Whether it is answered in precise form is not the question. Then the most you might say is that the answer was not responsive. It is not a refusal to answer. 206

Question 8 raises for the first time issues concerning which the defendant feels that his answers would tend to incriminate him. He then asserts his right in a straightforward manner, and immediately, so that everybody understands it. Therefore, it seems to me that we have a rejection of the argument of waiver, which is the only one upon which the Government can base itself.

I think there, too, it is pretty plain that no waiver can be construed. As to that, the courts, too, have spoken very distinctly.

"Bearing in mind the important nature of the constitutional right and immunity given by the Fourth Amendment, it seems to me that a trier of the facts should be slow in finding an intentional and voluntary relinquishment of this right by an individual when the effect of the testimony is uncertain." 207

That is from the case of United States v. Ruffner, 51 Federal Second 579, in the District Court for the District of Maryland.

The courts have constantly adopted this position; that is to say, that a waiver, if it is to be considered, must be a conscious and intentional waiver. Far from showing any such thing here, the witness indicated at the very first moment when the committee began to interrogate him concerning activities which Mr. Appell told us before were the purposes of the investigation that he did not intend to answer those questions or to give up the right of protection against self-incrimination. That is all that is required of him. The proof of that is that consistently, from that point on, throughout his testimony, he held to that position.

Therefore, I think, if Your Honor please, that question
209 8, merely because it flows right after one of the other questions, is no different from count 9, count 11, count 13, and so on down the line to count 32. It is just an arbitrary boundary line that Mr. Murray has set up. I do not think Your Honor should set it up for him.

I think this issue has been passed upon quite regularly by the court in all these cases and has been upheld even by Your Honor. I do not think a change should be made in this case.

I have already argued, so I shall not impose further upon the Court, as to the significance of the Rogers case. There the point is made in one sentence, requiring full disclosure of details.

The Rogers case held that the fact that a witness freely
210 testified as to an incriminating fact does not rest upon a further waiver of the privilege against self-incrimination, when she freely answered incriminating questions relating to her connections with the Communist Party.

That [illegible] the case of Jane Rogers v. United States, decided February 26, 1951, reported in 19 United States Law Week 4155, at page 4157.

It is upon that ground, if Your Honor please, that question 8 should be stricken. Question 7 should be stricken

because it has been answered, and question 8 because it is a proper exercise of the privilege against self-incrimination.

I do not know what Mr. Murray's argument on that score may be, but I find it very hard to imagine that there can be any sound argument against it.

Mr. Wright: May it please the Court: First, I wish to say that I, of course, emphasize each and every point——

The Court: Mr. Wright, usually only one counsel on each side argues a single motion.

Mr. Wright: I wanted to direct your Honor's attention specifically to questions 1 through 6. I do not believe Mr. Unger dealt specifically with them.

Mr. Unger: I withheld any argument on them deliberately, Your Honor, so that Mr. Wright might argue them. 212

The Court: Then, under the circumstances, I will hear you, Mr. Wright.

Mr. Wright: I think the record is eminently clear. Your Honor recalls the testimony as read by Mr. Murray with reference to questions 1 through 6. They are numbered, I believe, starting at page 2634.

Referring to question 1, if the Court please, as it reads from the indictment, whether the defendant was born under the name of Philip Bart, the answer given by the defendant is:

"It is my legal name. I vote under that name." 213

Obviously there was no refusal to answer that question.

With reference to count 2, as to when the defendant took the name Philip Bart, the question is:

"Mr. Tavenner: When did you take that name?

"Mr. Bart: Many years ago.

"Mr. Tavenner: When?"

"Mr. Bart: I don't care to discuss it."

At that point Mr. Unger interposes to make some objection, and some colloquy follows between counsel and the committee.

Obviously there was an answer to the question, from the defendant's point of view, when he said he took the name many years ago. So what transpired subsequently to interfere with a further raising of that question cannot now be said to be a refusal on the part of the defendant to answer question No. 2, which comprises count No. 2 in the indictment.

With reference to question No. 3, which is as to the name of the defendant when he came to the United States, we find
215 the following:

> "Mr. Case: What was your name at the time you came to the United States?
>
> "Mr. Bart: I have already answered this question.
>
> "Mr. Walter: What was it?"

At that point, again, there was interposition by counsel, and the colloquy followed between counsel and the committee members. There was no further rephrasing or reasking of the question, or doubt, mind you, on the part of the committee to suggest a specific, precise answer to the question. True, the answer might not have been responsive, but in a legal sense it cannot now be said that this constitutes a refusal to answer the question, because the committee,
216 having a full knowledge of the consequences which would follow from a specific demand upon the witness to specifically answer that question, certainly relinquished its right to do so, although the defendant did give an answer.

Whether it is an answer from the point of view of constituting a refusal, I think is clear: there is no refusal. The question was answered.

Count No. 4 has reference to the defendant's father's name.

"Mr. Tavenner: What was your father's name?
"Mr. Bart: I have already dealt with this question.
"Mr. Tavenner: When was your father naturalized?
"Mr. Bart: I do not remember."

That indicates that each time there was an answer given to the interrogation put to the witness, and a continuation of questions made by counsel for the committee indicates there that the question was answered, so far as the committee was concerned, and that the committee did not wish to insist on some specific answer to the question.

So in a legal sense—and now we are talking about the question as to whether the defendant ought to be convicted because the evidence goes beyond a reasonable doubt—No. 218
1, that he refused, and that his refusal comes within the statute under which he is tried—obviously that is not the case.

Question No. 5 is:

"Mr. Walter: Under what name did your father become a citizen of the United States?
"Mr. Bart: Under his own name."

How that could be construed to be a refusal of the question asked, I fail to see.

Question No. 6:

"Mr. Walter: • • • What name did you change your 219
name from?
"Mr. Bart: I have already stated my reply to this question.
"Mr. Harrison: I understand you refuse to answer the chairman's question?
"Mr. Bart"——

and this is significant——

> "My answer is that I have answered what my name is here * * *."

The rest, in my judgment, is superfluous. As to whether the defendant determined a question pertinent or not, I do not think, with reference to his answer in this record, it can be said to be a refusal.

Mr. Walter further says:

> "Of course, all of this is a matter of public record?
> "Mr. Bart: Correct."

221

I think this further supports the proposition that there is no evidence, certainly, sufficient to make a prima facie case, let alone one beyond a reasonable doubt, which is the obligation of the Government in this case.

Then, reading further, one final line from Mr. Walter:

> "And then I suppose you know that under the law a question innocent on its face can't be arbitrarily ignored. You can't refuse to answer such a question without running the risk of the consequences."

Then, Mr. Unger interfered again and said this:

222 "I think, again, Mr. Chairman, Mr. Bart has indicated very plainly he has not been contumacious in any regard. He states his name has been Philip Bart for a large number of years."

Then, finally, Mr. Case says:

> "Mr. Chairman, it seems to me the witness should be advised of the possibilities of contempt when he fails to answer a question as simple and as proper as your

question as to what his name was before it was changed."

"Mr. Walter: No. He has counsel. Counsel knows that is the law. Proceed, Mr. Tavenner.

"Mr. Tavenner: Mr. Bart, I understood you to say that you changed your name legally about fifteen years ago?

"Mr. Bart: I do not recollect. Maybe a few years more or a few years less.

"Mr. Tavenner: And that was done in New York City, was it?

"Mr. Bart: Correct.

"Mr. Tavenner: By what court?

"Mr. Bart: I do not recollect." 224

So on go the questions and answers in each and every regard with reference to the first six counts of this indictment, as to which the Government claims there has been refusal. There have been answers.

It is not as though the defendant had said, "I will not answer the question," or had sat silently and idly by. An answer was given. The Government is required to put before your Honor, sitting as both court and jury, a case established beyond a reasonable doubt. It seems to me, on the basis of the record alone, as introduced by the Government and by its own witness, that the Government has failed in this respect, and I respectfully say that your Honor ought to grant the defendant a judgment of acquittal with 225 reference, at least, to the first six counts of the indictment, Mr. Unger having directed himself to the other two remaining.

Thank you.

The Court: Mr. Murray, where are the refusals to answer for each one of these first six? Where do you consider that they are?

Mr. Murray: I will deal with that matter, Your Honor. Do you wish me to do it at this time?

The Court: I think it would be helpful if you would.

Mr. Murray: The first question was:

"Were you born under the name of Philip Bart?"

Mr. Bart says:

"I wonder what this question has to do here?"

Mr. Unger makes a remark. Mr. Bart then says:

"It is my legal name. I vote under that name."

227 That is not an answer to the question:

"Were you born under the name of Philip Bart?"

The Court: Where does it say that that is not an answer to the question?

Mr. Murray: I beg your pardon. I should have indicated that I had stopped reading. Mr. Bart said:

"It is my legal name. I vote under that name."

I have just quoted what Mr. Bart said. The question was: Under what name was he born? Not what his legal name was; not under what name he voted; but under what name he was born. That was the question. It was not answered.

228 Therefore, I say it is a refusal.

He did not say, as Mr. Wright has pointed out in regard to this particular question, although I do not think it applies to every one of them—he did not say, "I will not answer; I refuse to answer." But the fact is that he did refuse to answer. He does not have to say, "I am refusing." If in fact he does it, then he has committed the act, because the indictment charges him with refusing, not with saying he refuses, and refusing.

The second count refers to the question:

"When did you take that name?"——

meaning, "When did you take the name Philip Bart?"
Mr. Bart says:

"Many years ago."

He is pursued, then:

"When?"

He says:

"I don't care to discuss it."

230

Mr. Unger says:

"Mr. Chairman, again, I think the purpose of the inquiry here must have something to do with something other than whether Mr. Bart had a different name at birth or any time in his life. He has stated that is his legal name. I think that should be sufficient to identify him for your committee. Beyond that, I don't know what it is for."

Then, Mr. Walter said:

"That will be developed, of course. It is an entirely proper question. If you are not going to answer, you just decline to answer and state your reasons for 231
declining.

"Mr. Bart: The reason, is Philip Bart is my legal name. • • • "

The reason for what? The reason for my not answering your question.
The Court: Which question?

Mr. Murray: The question is, When did he take that name? meaning—well, just what it says: When did he take the name——

The Court: Well, there is a further answer down there, where he says:

> "I will not answer it because it is not pertinent to the hearing."

Mr. Murray: Exactly.

The Court: But does not that answer go back to the first question rather than the second?

Mr. Murray: I do not see anything between the second
233 question and that statement. "I will not answer it," to indicate that the refusal relates to anything but the second question. He is refusing, if the Court please, to state, in the first place, what name he was born under; and in the second question, when he took his present name, which he keeps referring to as his legal name and the name he votes under.

The examiner had attempted to learn from him what his name was before it was Philip Bart. The witness has evaded and resisted that effort of the committee and has not yet stated under what name he was born; nor has he stated when he changed to the name Philip Bart.

I am reading, now, if the Court please. Mr. Harrison
234 said:

> "Do I understand you refuse to answer the question?"

Mr. Bart said:

> "I will not answer it because it is not pertinent to the hearing."

That question, it seems to me, obviously is, "When did you take the name Philip Bart?"

Mr. Unger wants me to continue reading.

"Mr. Case: Mr. Chairman, I think he stated he took that name a certain number of years ago. When was it that you took that name?

"Mr. Bart: I do not recollect.

"Mr. Case: When did you come to the United States?

"Mr. Bart: I came here as a child. I do not know the date.

"Mr. Case: How old were you when you came?

"Mr. Bart: I was ten or eleven years old."

Is that the part? 236

Mr. Unger: Yes. He has answered the question.

The Court: What I am asking about is, What would you consider as indicating that he refused to answer? In this one question up here, he is asked:

"Were you born under the name of Philip Bart?"

He came back with a question and asked:

"I wonder what this question has to do here?"

Until question No. 2 comes up, no one tells him. No one answers his question.

Mr. Murray: Well, he has no right to question the committee.

The Court: I know, but no one says he should answer. 237
He asked a question. It was not answered at all, and they went on to something else; they did not respond.

Mr. Murray: I think the context shows that where he has refused to answer, the committee thought it futile to pursue it.

The Court: In the middle of the page, a little below, I think, where he says,

238 *Motion to Dismiss the Indictment at the Close of the Ca*

"I will not answer it because it is not pertinent to the hearing."

That is the answer to count 2—the question in count 2?

Mr. Murray: Yes, Your Honor. Well, to sum the whole thing up, in regard to all these questions, if the Court please, from 1 through 6, the committee never did find out what this man's name was before it was Philip Bart. I gather from part of Mr. Unger's argument that it was not important and was not pertinent. He has argued today somewhat like Mr. Bart himself argued before the committee, or at least stated before the committee, that it made
239 no difference what his name was some years ago.

I say it did; and if it did, we can forget the pertinency part of it and grant that it is pertinent.

I think it is quite clear from the examination that the committee never did find out what this man's name was before it was Philip Bart. That is what the committee was after. It asked questions which were designed to bring that out and which, if responded to, would have brought it out. The committee not only wanted that information, but they sought the means to get it by specific inquiries, and they did not get answers to them, and never did get the information which the questions show they were trying to get.

Your Honor, that is all I propose to say in regard to Your Honor's question. I should now like to address my-
240 self to the whole case. I have not as yet begun my argument.

I think it necessary that I should answer Mr. Unger's argument, although I shall be brief in the portions of it which do not relate specifically to the legal questions involved.

Mr. Unger first had some general comments to make in regard to the Committee on Un-American Activities, which he described as a committee which had constituted itself to

become a grand jury, an inquisitorial body, and not an investigating body. I do not know in what respect he draws the distinction between an inquisitorial body and an investigating body, but certainly a Congressional committee—not merely this committee, not merely the committees of this day generally, but committees from the time they were in use, which, of course, was before we ever had a country or a Congress—has been of the inquisitorial kind, in the sense that they have thought it to be their duty and right, in making investigations which were put to them, to call before them not merely willing and cooperative witnesses, who had facts——

The Court: Mr. Murray, I think that is so well established that you do not need to discuss it, unless you just 242
wish to make a record.

Mr. Murray: I wish to make a record of it, because I have listened with more patience than I think should be required of the average lawyer to an argument of the type such as Mr. Unger has presented today, and I should like to go on record in responding to it. I shall be brief—considerably more brief than Mr. Unger was in his argument, in his attack on the committee; nevertheless, I should like, with the Court's permission, to say something in answer.

The Court: Very well.

Mr. Murray: A legislative committee has the right to question resisting, uncooperative witnesses. In that sense, it is an inquisitorial committee, and in that sense it has a 243
right to examine and cross-examine. It has the right—the same right—that a party would have in calling his own witness and cross-examining that witness if that witness proved to be hostile. Therefore, in so much of the sense that it makes it an inquisitorial body, it is a right one.

I should like to say further that although Mr. Unger has indicated quite plainly that he does not approve of the activities of this committee, he is out of line with many of

our people and with the Congress itself, which has repeatedly recreated it as a special body and finally constituted it as a permanent one. That committee has shown and proved its worth and has exposed in some notable instances wrongdoing of great concern to our country, which other agencies of the Government were either unable or unwilling to expose.

But I shall not dwell any further on that subject, except to point to the criticism which that committee has excited from the Communist Party and its associates, affiliates, and friends, which I believe is the highest compliment that can be gained for it.

245 So much for the editorial part of the argument. Now to the law.

I think I might have argued to the Court with propriety that a court can take judicial notice of the grave necessity for a body such as this committee to learn from witnesses who appear before it their own identity and environment. When a given witness is one whom they suspect of being, and in this case has admitted himself to be, a member of the party which has been judicially recognized, and legislatively also, as the one devoted to the overthrow of our Government by violence if necessary; and when it is understood that this committee, through its investigations over the years, has learned, as must be obvious, that persons engaged in the conspiratorial, secret activities which this party has engaged in, will necessarily use aliases and different names
246 at different parts of their lives, and that some persons will use some other persons' names, and that the indexes and files of this investigating committee will have references to activities of one person under many names, and maybe of many persons under one name, I say that if a body needed to know the identity of witnesses appearing before it, this one does.

I think, therefore, the pertinency of a question to a witness, "What was your name before it became this legal,

voting name you are talking about?" is certainly demonstrated.

Your Honor may recall that later in this very examination the witness was asked whether he had used the name Jack Childs as a member of the Communist Party. He refused to answer that question. At any rate, whatever the committee knew or believed in regard to whether he had used aliases, it certainly had a right to know what his name was before it was Philip Bart. It may be that he had not changed it as long ago as fifteen years. They did not have to take his word for it. They could probe him as to the circumstances. It may have been fifteen months or fifteen days before that he had changed it.

At any rate, I submit that the pertinency of that question, or of that line of questioning, as to the identity of this individual, appears obvious. In that connection, if I can lay my hands on it, if the Court please, I should like to read briefly from an opinion of the Supreme Court of the United States in the case of Alford vs. United States, 282 U. S. 687, at 691. This case was decided in 1937 and was a case in which the Supreme Court reversed a conviction.

The Court: Was that on the question of where a witness lived?

Mr. Murray: Yes.

The Court: I am familiar with that case.

Mr. Murray: You remember the case?

The Court: Yes.

Mr. Murray: It involved the matter of cross-examination. As I have argued before, a few minutes ago, I think that is analogous to this type of investigation.

> "Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community, so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood"—

250 *Motion to Dismiss the Indictment at the Close of the Case.*

comparing cases by citation——

> "* * * and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased."

I have skipped one phrase here:

> "* * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment."

I think that last phrase is the one most apt to the present argument. That was in the Alford case, which was greatly
251 drawn from by our own Court of Appeals in the Lindsey case, involving another question on cross-examination.

So I say that the committee had every right to know what this man's name was, not merely on the day when he appeared before them nor a year ago, nor even, if he is to be believed, fifteen years ago, but what it had been in times before that, especially in view of the fact that he had most certainly changed it, having come from a foreign country.

I should like also to argue to the Court in that connection that we are dealing here with pertinency and not materiality. There is a difference, I believe I can argue here, between pertinency and materiality. In this respect there is a difference: Materiality very often means that which is relevant and important to the issue, and not relevant
252 alone. In Webster's New International Dictionary the word "pertinent" has many distinctions. I have one or two here, and a list of synonyms.

> "1. Belonging; pertaining; suitable. * * * 2. Belonging or related to the subject matter in hand; fit or appropriate in any way; adapted to the end proposed; apposite; material; relevant; as, *pertinent* illustrations or arguments; *pertinent* evidence."

Then, it goes on to say:

"Pertinent, relevant, apposite, apt, telling, felicitous, happy are applied particularly to what said."

Then, the word "material" in the same dictionary, Webster's New International Dictionary, has in its definition No. 3:

"Of solid or weighty character; substantial; or consequence; not to be dispensed with; important; specif., esp. *Law*, such as does or would affect the determination of a case, the effect of an instrument, or the like; constituting a matter that is entitled to consideration; such as must be considered in deciding a case on its merits." 254

These are the definitions of "material".

Congress did not choose that word "material" to put into this particular statute, but it chose the word "pertinent," and the word "pertinent" means that which pertains or belongs to it.

Another definition is "fit or appropriate in any way," by which I argue it means not necessarily any solid or weighty way. Therefore, a question could be pertinent which was not material.

I argue to Your Honor that in this case the name of this particular witness was both pertinent and material, but if need be, under the statute, only pertinent.

As to count 7, that was the count in which the defendant was asked to state his occupations. That is on page 2638 of the exhibit, if the Court please: 255

"Mr. Tavenner: Will you briefly summarize for the committee other positions which you have held and from which you have received a salary or gratuity, prior to the position you now hold?

"(Witness confers with his counsel.)"

"Mr. Bart: It is evident that in these questions a newspaper is involved, and I shall not answer because I feel that this committee, if it proceeds with this kind of questions, is infringing on the First Amendment of the Constitution of our country, freedom of the press, and I shall not be a party to anything of that kind.

"Mr. Tavenner: That is the ground upon which you refuse to answer the question as to what positions you have held prior to your present position?

"(Witness confers with his counsel.)"

We have, then, no further statement by anybody, but the
257 next thing is a question. For all the record shows, that question could have been immediately, or seconds, or minutes later. There is no evidence to dispute the record or to explain it: therefore, I do not think it ought to be assumed that the next question constituted an interruption. The witness had taken his position in regard to the question when he said:

"I shall not answer because I feel that this committee,"

and so forth.

Now, in that claim that the question was infringing upon freedom of the press, the defendant was without right. That has been decided in regard to other phases of investi-
258 gations by this committee, not referring specifically to a question about a newspaper, but referring to the protection in the First Amendment, given to citizens, from infringement upon freedom of the press, assembly, and religion—personal freedoms of the First Amendment—the right of assembly, and so forth.

It was contended in cases involving Communists and suspected Communists who refused to answer questions before the same committee in the years past that the very

investigation itself and the resolution creating it were in violation of the First Amendment, in that they forced citizens to reveal their political beliefs and thus expose them in such a way as to frighten them from freedom of expression in regard to those beliefs. Those attempts failed.

We have here Mr. Bart as a witness undertaking to protect not himself from self-incrimination, but to protect a newspaper from having its freedom in regard to the press infringed upon by this committee putting a question to Mr. Bart as a witness. I say that is not a just ground of excuse.

For the same reasons as I have urged Your Honor in 260
support of the counts 1 to 6 in regard to the witness' former name or names, this question, too, would seem to be pertinent as calling for his prior occupations. As a matter of fact, it revealed one occupation of considerable interest to the committee, when he finally answered the question, in so far as it did not include newspapers.

Now, was that question abandoned? I say it was not. I say that the tenor of the entire examination, and the circumstances known to the witness and the committee in regard to their own purposes and each other's, indicates clearly that this was not suspected by either the committee or the witness of being an interview between friendly and cooperative parties. This promised to be—from the outset it proved to be, once they got going—a contest between a committee trying to get information and a witness trying 261
to see that they did not get it.

I shall not take the time, if the Court please, to point out other portions of the record; I cannot do it readily. But you will remember that at one time the witness was asked, "What name did you change your name from?" That was before this particular question. There was some discussion there. Mr. Walter said:

"You can't refuse to answer such a question without running the risk of the consequences."

That was in regard to another question, yes, but it was previous to this one.

This witness, who showed throughout the hearing the kind of witness he was, in so far as this committee was concerned, and showed what he thought of the committee, was represented by counsel there to advise him as to his rights, and he was prepared, I say, to refuse to answer whenever he thought he could.

We do not have here a situation comparable to the
263 situation of a witness appearing before a grand jury, we will say, who has refused to answer a question and then is taken before a court. Very frequently it happens that when a witness thinks he has a right to refuse to answer a question, and is taken before a court and is told he does not, he will answer. I do not believe that anybody who has become acquainted with the facts in this case, as shown in this Court, expects that Mr. Bart was such a person. I do not think he was there or that Mr. Unger was there for the purpose of inquiring solicitously what were the wishes of the committee, so that he might readily comply with them. I think, rather, his purpose was quite different, and that he knew it, the committee knew it, his lawyer knew it, and each knew the other knew it. Therefore, he did refuse to answer that question. He had no
264 right to believe that the committee thought he was within his rights in refusing to answer, and he was, therefore, guilty of contempt.

I shall now call to the Court's attention authorities which I think are analogous to the charge in this case. Mr. Bart has not been brought before this Court for the purpose of being directed to answer a question. He was not appearing before the committee for the purpose of presenting legal objections and having them ruled upon by the committee.

I think, as I said a moment ago, it can be readily concluded that he had no intention of complying with whatever ruling the committee might have chosen to make, but rather of complying with the advice he received from his attorney, conforming to his own views in the matter.

Nevertheless, the charge against him here is that he refused to answer pertinent questions. The statute makes it an offense for one to do that. The statute says:

> "Whoever, having been summoned as a witness, by authority of the House, to appear before a subcommittee, and who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be guilty." 266

The offense has been committed, it would seem, when a person has done that. The Supreme Court decided precisely that in relation to a statute which was not substantially different from this present one. The Supreme Court decided that in the case of United States v. Murdock, 284 U. S. 141. In that case, the defendant, Murdock, was called before an Internal Revenue agent for the purpose of answering questions in regard to his own income tax returns. He refused to answer certain questions, and his lawyer, who was with him, explained to the agent that Mr. Murdock was afraid of being prosecuted by the State of Illinois.

There was a statute in force, passed for the very purpose of enabling the Internal Revenue agent to take Mr. Mur- 267
dock before the district court, and there have the court compel him, if the court so ruled, to answer the questions. Nevertheless, the agent did not do that. He did not take him before the court.

Now, Your Honor, let me call your attention to the fact that there is no comparable statute in this situation. The committee cannot bring a witness before the court and make him be compelled to answer. But the agent there could

have done that with Murdock. He did not. Rather, he preferred to have him indicted, and he was indicted, for failing to answer those questions.

It was urged in the court—it went up to the Supreme Court, and it was urged there, too, in the argument—that this prosecution of Mr. Murdock was premature, because he had been charged with an offense when he had not had a chance to know whether the claim of self-incrimination that he made was honored or not. Of course, the agent did not do that. He did not get out the law books and tell him he was wronged. But Murdock lost. Murdock lost on that point in both courts.

269 The Supreme Court said, at page 148 of volume 284, that while Murdock's right to refuse to answer that question undoubtedly could have been tested in the district court,

> "there is no support for the contention that there must be such a determination of that question before prosecution for the willful failure so denounced. By the very terms of the definition, the offense is complete at the time of such failure."

Your Honor will remember the Sinclair case, 279 United States 263, where the defendant was asked questions, and he refused to answer those questions on the advice of counsel, because they were not pertinent to the inquiry.

270 He did not use that term as the defendant here did in regard to these several counts in the indictment, but that was clearly the basis for his lawyers telling him he did not have to answer and his basis for not answering, because in that case the investigating committee was inquiring into matters which were then the subject of issues yet to be tried in a court between Mr. Sinclair and the Government.

His lawyer said, "The Government can't drag you before one of its Congressional committees and get information out of you before trial. Don't you answer that."

Sinclair did not. The Supreme Court said:

> "There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts stated were pertinent as a matter of law, and section 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law 272
> is no defense."

Section 102 is our Section 192 of Title 2, the same statute, and the same portion of the statute, that is to say, refusal to answer questions.

So a witness who undertakes to refuse to answer a question because it is not pertinent is, by the Sinclair case, doing so at his own peril. I do not see any reason why the rule should be different if the refusal is on the constitutional ground of self-incrimination. I think the Sinclair case itself is analogous authority, and the Murdock case even more so, perhaps, because that case involved just such a statute, and there there was a provision to have a predetermination by a court, which we do not have here, and 273
that was by-passed by the agent. It was argued there that the agent was neither qualified nor authorized to pass upon Murdock's constitutional claim and that, therefore, the statute authorizing the agent to take Murdock before the court was in effect mandatory, because it was only before the court that his fine claim of constitutional immunity could be intelligently and effectively passed upon.

Finally, count 8:

"Who were the other officials of the Ohio section of the Communist Party during the period of time you were organizer there?"

To that Mr. Bart said:

"I object to this question. I will not answer it, standing on my rights in accordance with Article V of the Constitution, and furthermore I protest because this committee has asked this question of numerous people and has infringed upon their rights as American citizens.

275 "Mr. Tavenner: I think, Mr. Bart, I should point out that your testimony relating to other people who were associated with you at that time could not in any way incriminate you under the Fifth Amendment.

"Mr. Unger: I should like to correct you, Mr. Tavenner."

The committee declined to be corrected. The last remark, of course, is my own.

It seems clear from that that Mr. Bart had admitted, and voluntarily so, that he was an organizer for the Communist Party at different times, in different years, in Illinois and Pennsylvania, among many States, and most likely section organizer for the Communist Party in Ohio

276 at a certain time.

The Court: Do you not consider that this question relates back to what has preceded that time?

Mr. Murray: Yes, I do, Your Honor. I say the question relates to who were the officials at the time when Mr. Bart was an organizer. The text, both immediately before and immediately following, shows that it was understood by the questioner and the witness that the witness was being

asked, who were the other people in this group you were in when you were in it? If that be a correct interpretation, then there can be no doubt that the Rogers case is squarely in point. I base that on the ground of the waiver in the Rogers case.

There has been some discussion about the statute of limitations, but apparently there is a duty on the part of the interrogator to satisfy the witness that there is no prosecution pending against him, and that was not done here.

I might mention to Your Honor the case of O'Neill v. O'Neill, 55 Appeals D. C. 40, 299 Federal 914, which held that it was really a question with reference to a prosecu- 278
tion that would ordinarily be barred by the running of the statute of limitations. It said it was the duty of the interrogator to make known to the witness that that condition does not exist—that a condition does not exist which makes prosecution possible; specifically, to make known to the witness that there is no indictment pending already for that offense, which was returned before the statute ran. Therefore, although we have a difference——

The Court: What statute would that be under? The Smith Act was not passed until 1940, and this was in 1936.

Mr. Murray: I hesitate to argue on that basis, Your Honor, because it is conceivable there could be a conspiracy under the Smith Act and activities before it began.

The Court: Do you mean continuing?

Mr. Murray: Yes, before it began. That would be evi- 279
dence even though they discontinued it. It might furnish evidence of discontinuance and renewal, or it could also be a continuing conspiracy. The possible continuity of a conspiracy has been held to place an incriminating character on an offense which as a substantive violation would not be prosecutable.

So I rely, for this eighth count, not upon the running of any statute, not upon the lack of incriminating facts, but

upon the waiver in the Rogers case, as interpreted in the Rogers case. In other words, in this case the defendant had admitted that he was an official of the Communist Party, and he was simply being asked who were his associates. In that respect, it brings it within the very terms, it seems to me, of the Rogers decision.

In that case, Jane Rogers had admitted being a member of the Communist Party in previous years and had admitted being treasurer of the Communist Party of Denver, Colorado, until fairly recently, within a year previous to her testifying. She was then asked to give the names of the persons to whom she had turned over the books of the
231 party, which she said she had done when she quit that job. She refused to give them, first, because she did not want to get them in trouble, and belatedly, again, when she appeared before the Court again, on the ground of self-incrimination. But the Court said:

> "The privilege against self-incrimination, even if claimed at the time the question as to the name of the person to whom petitioner turned over the party records was asked, would not justify her refusal to answer."

That is at page 377 of the Advance Opinions, Volume 95, No. 7, Law Edition, Supreme Court Reports.

I mention that last because the Court also said that her
282 claim of self-incrimination was after that. Nevertheless, treating it as one seasonably made, the Court says it still was not any good, and the Court points out that by reason of the admissions which had been made, the pending question in that case could not call for further incrimination, or at least the possibility was an imaginary one which did not justify her in asserting privilege

> "after petitioner's admission that she held the office of treasurer of the Communist Party of Denver, dis-

closure of acquaintance with her successor presents no more than a mere 'imaginary possibility' of increasing the danger of prosecution."

The Court went on, further, to say—this is at page 379 of the same volume, and I am continuing to read where I left off:

"Petitioner's contention in the Court of Appeals and in this Court has been that, conceding her prior voluntary crimination as to one element of proof of a Smith Act violation, disclosure of the name of the recipient of the Party records would tend to incriminate as to the different crime of conspiracy to violate the Smith 284
Act. Our opinion in Patricia Blau v. United States, supra (340 U. S., at 161, ante, 176, 71 Supreme Court 223) explicitly rejects petitioner's argument for reversal here in its holding that questions relating to activities in the Communist Party are criminating both as 'violation of (and conspiracy to violate) the Smith Act'."

That is the end of the quotation by the Court from its previous Blau decision. Continuing, the Court says, in the Rogers case:

"Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one 285
person can be convicted of conspiring with persons whose names are unknown."

Therefore, it seems to me that applying that decision to this question 8, there can be no conclusion except that the defendant was not within his rights in refusing to reveal the names of associates in a group where he had identified

himself to be—and not merely a group, but, in part of the context ahead, the Party in various places.

I have only one additional thing to say, Your Honor. It takes me back to a part of my previous argument, namely, whether the committee had to pass upon this person's claim. The Eisle case has been cited by Mr. Unger. That was a case in which Judge Pine said the agency, the Securities & Exchange Commission, had to make its own election when the witness' claim of self-incrimination was made—either to take his testimony or to give him immunity. That was under a statute which would give him immunity if they took his testimony. So, of course, that election was forced upon
287 them the moment the witness made his claim.

That is not applicable here, for reasons I have stated to Your Honor, basing my argument on the statute in the case, as distinct from a case of summary contempt or a case where you have statutory immunity, and, in that connection, quoting from the Murdock case and the Sinclair case.

So I submit, your Honor, that the Government has proved in this case, as to each of the counts that have been argued, an unlawful refusal to answer.

Thank you.

Mr. Unger: I am sorry to ask the Court to permit me to speak again. I know it is an imposition on the Court, who has been very patient throughout the hearing.

The Court: Well, you have spoken at some length.

Mr. Unger: I certainly have. I should like to inter-
288 ject——

The Court: I will give you three minutes more—five minutes.

Mr. Unger: All right.

If Mr. Murray was going to prove to the Court how brief he was going to be compared with Mr. Unger, I don't think he proved his case, because he certainly argued his propositions at very great length. I think perhaps I shall not need as much time, precisely I think he buttressed the

arguments that Mr. Wright and I have made to the Court. This is a good example of how the mountain has labored and produced a mouse.

The Government starts out by accusing this defendant of having refused to answer a vast number of questions put to him in a committee hearing. It has come down now to the point where the main argument is the identity of the name he used before his name was changed. That is the main point that has been argued here this afternoon, and that is what this case has really dwindled to on the part of the Government, because as to the other two points, actually there is really nothing much to debate on them.

I cannot see how the legal arguments contended for by Mr. Murray can be accepted by the Court as to those two. 290
But as to the first six counts, again, we know they come down to that one question. Are we to say that the Government is contending that this is a criminal case that is being brought against this person, or are we simply to say at worst that it is de minimis, and at best, as Mr. Wright very fully argued, that there was no refusal to answer?

Very frankly, Your Honor, Mr. Murray has misconstrued his role here. Actually the committee of Congress need not have come here. This case need not have been here. They could have cited Mr. Bart to the Congress, and he could have been held in contempt and allowed to purge himself. In that way, at least, the matter would have been settled. Now that this thing is ended, how do we stand on this question of the name? Does the committee really want 291
it? Is it satisfied with the debates on the question? He could then have been informed, and he could have decided, "All right. If the committee wants me to, I will tell it."

The result of all this is that you find yourself in a peculiar, inadvertent position. A man sits through an entire hearing, and when he is all through he has not the faintest idea as to whether the positions he has taken have been accepted by the committee or not—not whether it is a legal

position, but whether the committee has accepted his answers or not accepted his answers. It is for that reason that we contend that this must be judged by the legal requirements of the Court, not by the requirements of an administrative committee.

Mr. Murray has brought this case here, and therefore the rules of law are applicable to it; therefore, he must prove beyond a reasonable doubt, not by speculation, that this man did not answer by refusing to answer—refusing to answer—not that he answered unresponsively, but that he affirmatively refused to answer. That cannot be speculated upon; he must prove it beyond a reasonable doubt. He
293 must prove beyond a reasonable doubt that the questions which Mr. Bart refused to answer were pertinent questions.

But, as was indicated, they did not even care about these questions. As Mr. Walter said at one point, it is a matter of public record. Mr. Bart answered who he was. The committee knew who he was. Mr. Appell testified that the committee knew this was the man they wanted. So clearly these questions have nothing more to do with the case. Therefore, I say again that in the criminal court they have no case.

If the citation had come up before Congress, which the law gives Congress the power to do, there would have been a different question. Mr. Murray, I am sorry to say, has not addressed himself to that. He is simply determined, and he wants to hold on to something—a little residue out
294 of this indictment.

"Give me a little piece of it. If you can't give me thirty-two, give me two."

This is not a bargain sale. We are not here to bargain with the Court. We are asserting legal rights.

As to the next question, No. 7, again, if that question has not been answered, then I have never seen an answer. In other words, if Mr. Walter by his question at that point, in which he withdrew the newspaper portion of Mr. Taven-

ner's question, did not then indicate that he was ready to accept—whether he was required by law is not important—but that he was ready to accept, in the course of this debate, that Mr. Bart should not answer questions concerning the press, he was, therefore, ready to accept an answer to a question outside the press, and he got that answer.

To claim after getting the answer that the question is not answered seems to me an outrageous imposition upon the Court and again does not constitute a refusal to answer.

Then, we come to the most shocking feature of this. On the basis of this answer that he does give to that question, because the committee wants to know about his previous employment for salary or other gratuity, we are now being confronted with the argument that that answer which he 296 gave straightforwardly to that question constitutes a waiver on his part of all his constitutional rights.

That is a strange kind of argument. Had he not answered question 7 at all—had he not answered question 7 at all—he would have been in the clear on question 8. That is conceded. But because he did answer question 7, he is not only indicted for question 7 but also for question 8. The truth is, though, that question 7 dealt with one thing, and that was his employment for money and gratuities, and he answered it. Now, it is possible he could have come before Your Honor and said, "I assert my privilege under Fifth Amendment"; but he did not. He chose not to, if you please.

He chose to say, "I did work for those organizations in 297 the answer to my last question."

Does he thereby waive his constitutional right? That is the question that is put here. I say it is impossible to come to a conclusion that he does not forfeit it.

The example of the Rogers case is not fair to the Court, because in the Rogers case the Court says, again and again, first of all, that the contention is rejected, because the question of records has nothing to do with the Fifth

298 *Motion to Dismiss the Indictment at the Close of the Ca*

Amendment. No. 2, the question of previous answers, on the subject of full disclosure, applies only after the petitioner has waived her privilege and properly answered criminating questions. Thirdly, in this case—the Rogers case—the defendant raised the question only of the possible charge of nspiracy under the Smith Act. That was what the Court addressed itself to.

The defendant said that while it may be true that he waived his protection as to the substantive protection under the Smith Act—that is, as to membership in the Communist Party—he did not waive his protection as to conspiracy with others. The Court says that is the same
299 thing, both as to violation of the conspiracy act and the violation of the Smith Act.

This goes beyond the Smith Act. This inquiry was being conducted as to a number of things; first, passports; second, recruiting; third, the Lenin School; fourth, financing. Any one of those may have been a conspiracy, a crime, a separate, independent crime, having nothing at all to do with the Smith Act. Therefore, to cite the argument of the Court in the Rogers case, where that specific point is raised, does not meet the question, because Mr. Murray has already admitted in answer to Your Honor's question that the conspiracy is a continuing one from 1936 on, indefinitely, but not only for violation of the Smith Act, but for any other crime which may be charged against him.

The testimony indicates that the committee was going
300 into many issues as to which Mr. Bart might have been held. Therefore, it cannot be said that he waived, under such circumstances.

Frankly, that is the entire case. There is nothing more to it than that. I am really a little distressed at the Government's insistence on holding on to something when it should not. The experience it has had in the number of these cases it has had—numerous cases—it has had about two hundred—should be an answer to the Government.

Simply to insist on trying every one of these cases is, I think, a little indecent.

The Court: Every case is different.

Mr. Unger: But the point is that the differences in these cases are not the significant thing. It is the similarity of these cases that is significant. In fact, on one day Congress cited about fifty of these defendants.

I should like to refer to the Court the opinion of one of the Court's colleagues, Judge Goldsborough, in one of these cases, in which he discussed this matter.

The Court: What is the name of the case?

Mr. Unger: This is the case of United States vs. Frederick Vanderbilt Field.

The Court: I am familiar with that case and with Judge Goldsborough's opinion. 302

Mr. Unger: Then, I shall certainly not burden Your Honor with it; but the principles there are almost the same.

To put a man in a position where he is faced with the prospect of thirty-two counts, and finally to come before the Court and to insist that because of some little technicality that might have arisen, or because of some little omission or oversight by counsel—I do not think the Court should submit to that.

I think the Court should indicate, as I have said before, to the Congress that there are certain rights Congress has, and they should be respected, and the Court will respect them; but that there are rights that a citizen has, and the Court must respect them. If the courts would only take 303 the precaution to see that the rights of citizens are protected procedurally and substantively, it would not be necessary to come before the Court and struggle as hard as we do for the liberty of a single citizen.

I find that that is the most important feature of this case —the need to come here—I do not mean myself only; I mean Your Honor too—because I think Congress hasn't any need to take this position. Had it given Mr. Bart

that opportunity, there would have been no trouble. Then we would have been confronted with a different situation.

The committee could have said, "Mr. Bart, we have only one problem here. We are still dissatisfied with your answers on the question of your name. We want to know from you definitely about this."

Then we would either have answered or faced the consequences. As it is, we are being convicted, in Mr. Murray's eyes, not for crime—not for crime—but for Mr. Murray's construction of what was going on in Mr. Bart's mind, which he has no right to do, and in the committee's mind, which he has no right to do—not upon any facts.

305 Mr. Murray would like to see this case disposed of on the basis that if this man asserts his rights before a committee, then that is a serious thing, which he must be punished for. I think the argument is based upon what I would call his animus in his opening remarks. I am sorry he made those remarks, because he was not addressing himself to me. I addressed myself to the actions of the committee, in so far as they have a bearing on the burden of procedure, which I pointed out to the Court. If that were corrected, it would undoubtedly help in the administration of justice. Therefore, I was entirely proper in doing so.

Mr. Murray shows animus here which is not proper, coming from an officer of the Court. He has a right as a citizen to express his views concerning the Communist Party and concerning the Committee on Un-American
306 Activities, whatever they may be. I have a right to express views opposite to those. We can contest those in the marketplace of ideas, but they have no place here in a discussion in the court, because then they are simply attempts to prejudice. I would say that that, in the last analysis, is the basis of Mr. Murray's approach to the entire case.

I respectfully ask Your Honor, as the trier of the facts and the law, to find for the defendant and to acquit him.

The Court: The Court denies your motion. Is there anything else just now than just the decision of the Court?

Mr. Unger: No, there is nothing else before the Court at the moment. I do not know, if Your Honor please, what Your Honor intends as the next step. Does that mean that Your Honor finds the defendant guilty?

The Court: I will state what my ruling is, if you will just be seated. I was inquiring whether you had concluded.

Mr. Unger: I have nothing further, Your Honor.

OPINION

308 The Court (MATTHEWS, J.): In this case the defendant, in an indictment of thirty-two counts, is charged with violation of the Contempt of Congress Statute for failure to answer certain questions when he appeared as a witness before a subcommittee of the Committee on Un-American Activities of the House of Representatives. The Government has abandoned all of the counts of the indictment except counts 1 through 8. It is charged that the questions which the defendant refused to answer were pertinent to the subject under inquiry by the committee. The defendant has waived trial by jury and has been tried by the Court.

The defendant contends, with respect to the first six counts under which he is indicted, that the questions involved were not pertinent to the subject of the inquiry. These are the questions relative to the names by which he 309 had been known and the name of his father.

The Committee on Un-American Activities as a whole or by subcommittee has been authorized to make investigation of the extent, character, and objects of un-American propaganda activities in the United States, and also of the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or is of domestic origin and attacks the principle of the form

of government as guaranteed by our Constitution, this being to aid Congress in formulating necessary remedial legislation.

It may not be an old Spanish custom, but certainly it is an English custom, having here the force of law, for the legislative body to call upon any person subject to the jurisdiction of the country to give information which the legislative body requires to enable it to formulate legislation.

Congress and its committees, acting as the chosen representatives of the people, is expected to perform its functions in such a way as to maintain the form of government
311 instituted by the people, and to see that any changes in the form of government are made as the Constitution provides, instead of by force or by subversive groups undermining the Government.

So the subcommittee in asking the questions involved here was performing its proper function. In so doing, it assumed that every person called is innocent of crime and would come forward and answer. Congress does not act on the assumption that a person is guilty of crime. One of our principles is that a person is presumed to be innocent of crime. If a person desires the protection of the privilege against self-incrimination, he is required to claim it.

In making investigations of un-American activities, Congress has power to inquire into the subjects of Communism and the Communist Party and to identify the individuals
312 who believe in Communism and who belong to the Communist Party.

With respect to the first six questions, the Court rules that they are questions pertinent to the inquiry. When a witness takes the stand in court, it is proper to ask questions to identify the witness and disclose his background. Likewise, a committee may ask questions to enable it to identify a witness, and to learn the background and en-

vironment of the witness so as to evaluate the testimony being given by the witness.

The defendant clearly understood the questions in the first six counts of the indictment, and that he was being asked to answer them. He indicated that he did not consider the information sought as within the scope of the business of the committee. He comprehended that he was refusing to answer those questions.

Concerning the question involved in count 7, the witness was asked to summarize positions held by him prior to his then position as general manager of Freedom of the Press, Incorporated, and he refused. He said:

> "* * * I shall not answer because I feel that this 314
> committee, if it proceeds with this kind of questions, is infringing on the First Amendment of the Constitution of our country, freedom of the press, and I shall not be a party to anything of that kind."

Later the witness was asked:

> "Did you ever hold any positions other than positions with newspapers?"

Without any claim of privilege whatever, he said:

> "I was organizer and head of the Communist Party at different times, in different years."

Then follows testimony indicating that the time of the 315
employment last referred to was years ago—probably 1936—in Ohio, among other States.

Next came the question involved in count 8, as to who other officials of the Ohio section of the Communist Party were at the time the defendant said he was organizer there. The defendant refused to answer that question.

It is true, with respect to that question, that he said he stood on his constitutional rights. But having answered

316 *Opinion.*

the question as to his own connection with the Communist Party, the Court takes the position that he waived the privilege.

Furthermore, the date involved is a long time ago—1936. The Court does not feel that the defendant had any apprehension, in refusing to answer that question, that he would be indicted or prosecuted with respect to occurrences in 1936. Moreover, the Court holds that after he had revealed his own affiliation with the Communist Party, the question asked about other people presented no reasonable danger of further incrimination, if there was any danger of incrimination.

317 The Court concludes and holds that the defendant is guilty as to counts 1, 2, 3, 4, 5, 6, 7, and 8.

Mr. Unger: Does Your Honor consider the first six counts different, although they apply to the same question? Your Honor rules that they are six separate counts?

The Court: I believe that there are six different counts. I think there was a ruling made some time ago by Judge Kirkland, was there not, with reference to that?

Mr. Unger: On a multiplicity of questions, that is true; but in view of the statement, in view of the admission of the obvious fact that each one of these six counts is a different way of asking the same question——

The Court: No, I believe they are a little different. The first question is:

318 "Were you born under the name of Philip Bart?"

The next is:

"When did you change your name?"

The third is:

"What was your name at the time you came to the United States?"

The next is as to the father's name; and then the name under which his father became a citizen.

I believe that all these counts have separate questions.

Mr. Unger: I see. What is Your Honor's wish at this moment?

The Court: Is the defendant on bond?

Mr. Unger: Yes, Your Honor. With all due respect to Your Honor's decision, we do intend to appeal therefrom. I am sure Your Honor will understand that.

The Court: Yes.

Mr. Unger: I think there are serious questions raised.

The Court: I would say that this may be handled in the usual way. A report will be requested from the Probation Office. The defendant is now on $1,500 bond. 320

Is there objection on the part of the Government to the defendant remaining free on bond?

Mr. Murray: There is no objection, Your Honor.

The Court: Very well.

Mr. Unger: Thank you. We will be notified?

The Court: Yes.

(At 3:45 P. M. the trial was concluded.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is the official transcript of proceedings in United States vs. Philip Bart, Criminal No. 1746-50, on Thursday, May 3, 1951. 321

FRANCIS J. ATTIG
Official Reporter.

322

Indictment.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

Holding a Criminal Term.

(Grand Jury Impaneled on October 3, 1950 and Sworn in on October 4, 1950.)

UNITED STATES OF AMERICA v. PHILIP BART	Criminal No. 1746—50 Grand Jury Original (2 U. S. C. 192)

323

INTRODUCTION

The Grand Jury charges:

On June 21, 1950, at and within the District of Columbia, a duly created sub-committee of the Committee on Un-American Activities of the House of Representatives was conducting an inquiry pursuant to authority conferred upon it by law, and particularly subsection (q) (2), Section 121 of The Legislative Re-organization Act of 1946, 60 St. L. p. 828 and House Resolution 5 of the Eighty-first Congress. The defendant Philip Bart appeared as a witness
324 before that sub-committee at the place and on the date above stated, and was asked questions all of which were pertinent to the question then under inquiry before the sub-committee. At the time and place stated the defendant refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition simply describe the question

which was asked of the defendant and which he refused to answer. 325

COUNT ONE

Whether the defendant was born under the name of Philip Bart.

COUNT TWO

When the defendant took the name of Philip Bart.

COUNT THREE

What was the name of the defendant when he came to the United States.

COUNT FOUR

What was the defendant's father's name. 326

COUNT FIVE

Under what name did the defendant's father become a citizen of the United States.

COUNT SIX

What name did the defendant change his name from.

COUNT SEVEN

Whether the defendant would briefly summarize for the sub-committee the positions held by him from which he had received a salary or gratuity, prior to the position which the defendant held at the time the question was asked. 327

COUNT EIGHT

Who were the other officials of the Ohio section of the Communist Party during the period when the defendant was organizer there.

COUNT NINE

Whether the defendant contributed an article to the December 1934 issue of Party Organizer, a publication issued by the Central Committee, Communist Party, United States of America, that article being entitled "The Recruiting Campaign in Cleveland District."

COUNT TEN

Who were the officers of district 6 of the Communist Party in 1934.

COUNT ELEVEN

329 Whether the defendant had traveled outside the continental limits of the United States since his first arrival in the United States.

COUNT TWELVE

Whether the defendant had ever been outside of the United States.

COUNT THIRTEEN

Whether the defendant had ever used the name of John William Fox.

COUNT FOURTEEN

Whether the photograph appearing on the second page of an application for passport signed in the name of John William Fox was a photograph of the defendant.

330

COUNT FIFTEEN

Whether the defendant used the passport signed in the name of John William Fox and referred to in Count Fourteen.

COUNT SIXTEEN

Whether the defendant knew William Weiner.

COUNT SEVENTEEN

Whether the defendant knew Ephriam Schwartzman.

COUNT EIGHTEEN

Whether the defendant received a letter bearing date February 21, 1939, signed by E. Schwartzman, national secretary, Jewish Peoples Committee, addressed to Mr. Jack Childs.

COUNT NINETEEN

Whether the defendant ever lived at 148 Second Avenue, New York.

COUNT TWENTY 332

Whether the defendant ever lived at 854 West One Hundred and Eightieth Street, New York City.

COUNT TWENTY-ONE

Whether the defendant wrote a letter to William Weiner, dated February 23, 1939, and signed "Jack".

COUNT TWENTY-TWO

Whether the defendant knew Bill Browder, the brother of Earl Russell Browder.

COUNT TWENTY-THREE

What connection was there between the Communist Party 333
and the control of the resort camp known as Camp Unity and referred to in a letter addressed to William Weiner, dated February 23, 1939, and signed "Jack".

COUNT TWENTY-FOUR

Whether at the time of the writing of the letter addressed to Mr. William Weiner, dated February 23, 1939, and signed

"Jack", the defendant held any position in connection with the publication of the Record, a newspaper published in Chicago, Illinois.

COUNT TWENTY-FIVE

Whether the defendant knew William Weiner under the Communist Party name of Blake.

COUNT TWENTY-SIX

Whether the defendant knew William Weiner under the name of Blake.

COUNT TWENTY-SEVEN

335 Whether World Tourists, Inc., ever paid out any transportation funds for defendant for any purposes.

COUNT TWENTY-EIGHT

Whether the defendant knew Marcel Scherer.

COUNT TWENTY-NINE

What positions in the Communist Party the defendant had held besides organizer in Ohio, Pennsylvania, Illinois and perhaps one other state.

COUNT THIRTY

Whether the defendant engaged in the State of Illinois,
336 in the work of recruiting prospective students to go to Moscow to study at the Lenin Institute.

COUNT THIRTY-ONE

Whether the defendant knew the names of any American citizens or any residents of the United States who attended the Lenin Institute at Moscow.

Indictment. 337

COUNT THIRTY-TWO

Whether the defendant ever attended Lenin Institute.

GEORGE MORRIS FAY,
United States Attorney in and
for the District of Columbia.

A True Bill:

LLOYD B. WILSON, JR.
Foreman

338

Arraignment and Plea.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES, v. PHILIP BART, Defendant.	Criminal No. 1746—50 Charge Vio. 2-192 U.S.C.

339

PLEA OF DEFENDANT

On this 24th day of November, 1950, the defendant PHILIP BART, appearing in proper person and being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

340 *Arraignment and Plea.*

Bond set at $1500.00; defendant is permitted to remain in custody of Deputy U. S. Marshall pending making of bond.

By direction of
BURNITA S. MATTHEWS
Presiding Judge
Criminal Court #1

HARRY M. HULL, Clerk
By (Illegible)
Deputy Clerk

341 Present:

United States Attorney
By CHAS. B. MURRAY
Assistant United States Attorney

H. B. SMITH
Official Reporter

342

343

Motion for Bill of Particulars.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA v. PHILIP BART	Criminal No. 1746—50

The defendant by his attorneys moves that the Court order the United States to file a bill of particulars supplying the following information:

344

1. The precise question which was under inquiry before the Committee on Un-American Activities when the defendant appeared before it.

2. The precise respects in and by which the questions listed in each of the counts of the indictment were pertinent to the question then under inquiry before said Committee.

3. The responses which the defendant made to the questions listed in the indictment.

4. The record of the hearing of the said Committee at which the defendant appeared as a witness.

5. The information which said Committee had in its possession at the time of the aforesaid hearing concerning the individuals named in counts Sixteen, Seventeen, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Six, and Twenty-eight.

345

DAVID REIN,
FORER & REIN.

ABRAHAM UNGER,
FREEDMAN & UNGER,
Attorneys for the Defendant.

346 *Motion for Bill of Particulars.*

CERTIFICATION OF SERVICE

I certify that on this 19 day of December, 1950, I served on the United States the within and foregoing Motion for Bill of Particulars and the Points and Authorities in support thereof by mailing true copies of the same, post prepaid, to George M. Fay, Esq., United States Attorney, United States District Courthouse, Washington, D. C.

DAVID REIN

---

347 **Motion to Dismiss Indictment.**

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP BART, Defendant.	Criminal No. 1746–50 Grand Jury Original (2 U. S. C. 192)

348 The defendant, PHILIP BART, moves that the indictment and each count thereof be dismissed upon the following grounds:

I.

1. That they do not allege facts constituting offenses against the United States of America.

2. That the questions asked of the defendant which are the basis of the various counts of the indictment, were outside the scope of a Congressional inquiry.

3. That the questions asked of the defendant which are the basis of the various counts of the indictment, were outside the subject matter of the legislative authority conferred by Congress on the House Un-American Activities Committee under Public Law 601.

4. That the questions asked of the defendant which are the basis of the various counts of the indictment, were not pertinent to the subject matter under inquiry by the Committee on Un-American Activities.

5. That the absence of answers to the questions which are the basis of the various counts of the indictment, did not constitute a refusal by the defendant to answer pertinent questions as provided by Section 192, Title 2 of the United States Code. 350

6. That the various questions not answered by the defendant and which are the basis of the various counts of the indictment, were, in fact abandoned and withdrawn by the Committee, that answers thereto were waived by the Committee, and that the Committee did not require the defendant to answer the questions to which objections were raised by the defendant.

7. That the questions which are the basis of the various counts of the indictment, numbered 7 to 32, inclusive, were of such a nature that the answers thereto might incriminate the defendant, and that the defendant asserted his privilege against self-incrimination as a basis for refusing to answer the said questions. 351

8. That the questions which are the basis of the various counts of the indictment, numbered 11 to 32, inclusive, were not put to the defendant by the Committee duly constituted as such, but were asked of him after he had been excused by the Committee and constituted interrogations by Congressmen in their individual capacity and not as a Committee.

9. That the Committee failed and refused to rule on the objections raised by the defendant to the various questions which are the basis of the various counts of the indictment, and did not direct the defendant to answer any of the questions to which he had raised objections.

That the defendant, Philip Bart, moves that the indictment and each count thereof be dismissed upon the further following grounds:

II.

1. That Section 192, Title 2 of the United States Code
353 under which the indictment was returned is unconstitutional on its face, and as construed and applied to the defendant is a violation of the Fifth Amendment guarantee of due process and against self-incrimination.

2. That Section 192, Title 2 of the United States Code, as applied to this defendant, is unconstitutional in abridging the defendant's right of speech, opinion and association in violation of the First Amendment.

3. That Section 192, Title 2 of the United States Code, as applied to this defendant, fails to provide any ascertainable standard of guilt as required by the Fifth and Sixth Amendments, and that the defendant was required to decide at his peril which questions might incriminate him.

354 That the defendant, Philip Bart, moves that the indictment and each count thereof be dismissed upon the further following grounds:

III.

I. That Public Law 601 on its face, and as applied to the defendant, abridges his right of freedom of speech, opinion and association in violation of the First Amendment.

2. That Public Law 601 on its face, and as applied to the defendant, exceeds the enumerated powers of Congress in violation of the Ninth and Tenth Amendments.

3. That Public Law 601 on its face, and as applied to the defendant, is a bill of attainder in violation of Article 1, Section 1 of the United States Constitution.

4. That Public Law 601 on its face, and as applied to the defendant, would compel the defendant to testify against himself in violation of the Fifth Amendment guarantee against self-incrimination.

5. That Public Law 601 on its face, and as applied to the defendant, would compel disclosures by the defendant of 356
his private personal affairs and of his political opinions in violation of his right to privacy and to silence under the Fourth and Fifth Amendments.

That the defendant, Philip Bart, moves that the indictment and each count thereof be dismissed upon the further following grounds:

IV.

1. That the indictment charges 32 separate alleged crimes when, in fact, as appears from the face of the indictment, only one crime, if any, was committed by the defendant, to wit, the refusal to answer questions put to him by a Sub-Committee of the Committee on Un-American 357
Activities, on June 21st, 1950.

2. That counts numbered 1 to 6, inclusive, of the indictment, allege a single and same offense in a multiplicity of counts, to the prejudice of the defendant.

3. That counts numbered 7 to 32, inclusive, of the indictment, allege a single and same offense in a multiplicity of counts, to the prejudice of the defendant.

4. That counts numbered 11, 12, 13, 14, 15, 19, 20 and 27, of the indictment, allege a single and same offense in a multiplicity of counts, to the prejudice of the defendant.

5. That counts numbered 8, 9, 10, 16, 17, 18, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31 and 32, of the indictment, allege a single and same offense in a multiplicity of counts, to the prejudice of the defendant.

That the defendant, Philip Bart, moves that the indictment and each count thereof be dismissed upon the further following grounds:

V.

359

1. The Grand Jury which returned the indictment against the defendant was illegally and improperly constituted for the reason that ten of its members are Government employees, and the defendant has reason to believe that relatives of other members are Government employees and others not presently in Government service are applicants for such employment.

Dated: December 15th, 1950.

David Rein,
Forer & Rein
711-14th Street, N. W.
Washington, D. C.

360

Abraham Unger
Freedman & Unger
11 Park Place
New York 7, N. Y.

Certification of Service

I certify that on this 19th day of December, 1950, I served on the United States the within and foregoing Motion to Dismiss Indictment and the Memorandum of Points and Authorities in support thereof by mailing true copies of the same, post prepaid to George M. Fay, Esq., United States Attorney, United States District Courthouse, Washington, D. C.

DAVID REIN

Affidavit of David Scribner.

362

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA v. JULIUS EMSPAK	Criminal No. 1742—50

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID SCRIBNER, being duly sworn, deposes and says: 363

I am one of the attorneys for the defendant named in the above bill of indictment.

This affidavit is made in support of the motion to dismiss the indictment on the ground that it is void and illegal in that the Grand Jury which voted the indictment was illegally constituted as to this defendant.

I have been advised that the Grand Jury records in this Court will indicate that 10 of the 23 members of the Grand

Jury which voted the indictment against this defendant were employed by the government of the United States, and that two of the Grand Jurors are listed in the records as "unemployed."

Information about the employment of the wives or husbands or children of the Grand Jurors can be obtained only from examination of the Grand Jurors at a hearing or from examination of records not presently available to the deponent.

This indictment arises out of an investigation and inquiry by the House Committee on Un-American Activities. The questions in the indictment referred to alleged Communist
365 activities or association. On information and belief, the transcript of the hearing before the "Sub-committee" of the House Committee on Un-American Activities was made available to the Grand Jury.

The above facts, among others, in the context of Executive Order 9835, known as the President's Loyalty Order, which order includes as one of the criteria for continued employment the absence of any "sympathetic association" with the Communist Party or other activities alleged to be "subversive" requires that the defendant be permitted by the Court to inquire further into actual and implied bias and prejudice on the part of the Grand Jurors.

I respectfully call the attention of the Court to the decision of the Supreme Court of the United States in *Dennis* v. *United States,* 339 U. S. 162, in which opinion the Court
366 held that a defendant has the right to show by proof both actual and implied bias on the part of jurors.

Under the applicable law the defendant must be given an opportunity to demonstrate and inquire into the effect of the President's Loyalty Order upon government employees in general and those in the Grand Jury in particular. The defendant must be given an opportunity to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of government employees including

their activities as Grand Jurors or the activities as spouses of Grand Jurors in respect to issues like those involved in the present indictments. I respectfully call to the attention of the Court the threats of the House Committee on Un-American Activities against the Attorney General if indictment in contempt cases were not returned (see 93 Congressional Record 3815, 3932).

In this connection Mr. Justice Jackson's description of the atmosphere in Washington in 1948 insofar as it affects government employees in *Frazier* v. *United States*, 335 U. S. 497, is certainly even more significant at the present date.

The passage of the Internal Security Act of 1950 and in 368
particular the specific reference to government employees and the sanctions placed therein upon "sympathetic association" by government employees with alleged Communist activities created more than a reasonable presumption of a sufficient influence upon such government employees so as to grant the defendant a hearing at which actual or implied bias and prejudice is shown to be present in the respective Grand Jurors.

Under these circumstances the defendant has the right, as the Supreme Court stated in *Dennis* v. *United States*, cited *supra*, to bring "circumstances * * * to the Court's attention which would convince the Court that government employees would not be suitable jurors" in this particular proceeding. Under the mandate of the Supreme Court the defendant likewise has a right to ascertain whether the 369
spouses or relatives of other Grand Jurors are government employees, particularly since they may be employees of the very Congressional Committee here involved. Similarly the defendant has the right to ascertain whether Grand Jurors listed in the records as "unemployed" are now seeking government employment.

Therefore, I respectfully urge the Court to dismiss the indictment and in the alternative that the defendant be

370 *Affidavit of David Scribner.*

granted a hearing pursuant to Rule 12(b) (4) of the Federal Rules of Criminal Procedure to prove by evidence to the Court that more than 11 of the Grand Jurors were actually or impliedly biased and prejudiced against the defendant and that the indictment is therefore void and illegal.

DAVID SCRIBNER.

Sworn to before me this
16th day of December, 1950.

DAVID RAINER
Notary Public, State of New York
No. 41-3211050
371 Qualified in Queens County
Certs. filed with N. Y., Kings, Bronx and
Westchester Co. Clks.
Queens, Kings, N. Y. & Bronx Co. Registers
Commission Expires March 30, 1951.

372

373

Affidavit of David Scribner.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JULIUS EMSPAK	Criminal No. 1742—50

AFFIDAVIT

374

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID SCRIBNER, being duly sworn, deposes and says:

1. I am one of the attorneys for the defendant named in the above bill of indictment.

2. I have consulted with the defendant in respect to the charges set forth in the indictment.

3. This application is made in good faith for the purpose of informing the defendant of the particular offense upon which he stands charged.

4. The defendant cannot properly answer the charge set 375
forth in the indictment or move in respect thereto without the additional information asked for in the request for a bill of particulars.

5. Without the information requested the defendant cannot properly prepare a defense.

DAVID SCRIBNER.

Sworn to before me this
16th day of December, 1950.

DAVID RATNER
Notary Public, State of New York
No. 41-3211050
Qualified in Queens County
Certs. filed with N. Y., Kings, Bronx and
377 Westchester Co. Clks.
Queens, Kings, N. Y. & Bronx Co. Registers
Commission Expires March 30, 1951

378

(Insert P. 127 "Supplemental Affidavit of David Scribner in Support of Motion to Dismiss Indictment.".

The original carried on its face the following handwritten notation:

"Supplemental affidavit stricken for the reason that it is legally insufficient. Objection noted.

/s/ James R. Kirkland
1/19/51 Judge

379

Supplemental Affidavit of David Scribner in Support of Motion to Dismiss Indictment.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JULIUS EMSPAK	Criminal No. 1742—50

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT ON THE GROUND THAT THE GRAND JURY WAS ILLEGALLY CONSTITUTED 380

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID SCRIBNER, being duly sworn, deposes and says:

I am one of the attorneys for the defendant herein.

This supplemental affidavit is in further support of the motion to dismiss the indictment, on the ground that the Grand Jury which voted the indictment was illegally constituted as to this defendant.

Since the date of my affidavit of December 16, 1950, heretofore submitted in support of this motion, I have 381
ascertained and assert, upon information and belief, that in addition to the ten government employees who were members of the Grand Jury which voted the indictment herein, referred to in my former affidavit, there were two Grand Jury members whose husbands were federal government employees at the time the said Grand Jury considered and acted upon the indictment of this defendant.

382 *Supplemental Affidavit of David Scribner*

The defendant respectfully requests that the indictment should be dismissed herein for the reasons given in my former affidavit in respect to the government employment of grand jurors, as supplemented by the information herein with respect to two additional members of the Grand Jury, and with respect to the miasma of fear as it affects government employees. The following individuals were members of the Grand Jury which indicted the defendant herein, and who were employed by the federal government: Laura M. Boyd, Robert G. Dorrity, William H. Floyd, Harry Lee Gray, Charles A. Lickner, Ralph A. Montgomery, Thelma G. Nelson, Raymond D. O'Brien, James P. Perry,
383 James J. Worthington, Mrs. Ida Mary Waldron, wife of a federal employee, and Mrs. Inez Bryant, wife of a federal employee, were also members of this Grand Jury.

In the alternative, defendant requests that the Court direct that a hearing be held pursuant to Rule 12(b)(4) of the Federal Rules of Criminal Procedure, so that defendant may prove that more than 11 of the grand jurors were biased and prejudiced against the defendant.

Government employees for the past few years have been the subject of an active campaign to determine whether they are in any way sympathetic or tolerant to "Communism" or "Communists," or sympathetic to any person who in turn is associated with "Communism" or "Communists" or with organizations which have been called "Communist Fronts" or with persons who may have been
384 called "Communist fellow travelers."

This has developed a miasma of fear among government employees in the District of Columbia. Congressional leaders and congressional committees and the heads of the various federal executive agencies have called for or engaged in efforts to "purge" from government employ persons found to be so stigmatized. As a class federal government employees cannot exercise the degree of impartiality required by the Constitution and the statutes

in the carrying out of their functions as grand jurors in a case such as the one at bar, where the defendant is charged with an offense related to the investigation of "Communist" influence.

The issue involved in the investigation by the House Un-American Activities which led to the contempt charge herein, related, according to the Committee itself, to the "infiltration" of Communists in labor unions and particularly in the union of which the defendant is a member or officer. This is the very Committee which has given much time and consideration to the investigation of alleged Communist influence among federal government employees and has announced time and again that the Committee files have 386
been used by the investigative agencies of the federal government to determine the loyalty of federal government employees. (Report of the Committee on Un-American Activities to the U. S. House of Representatives, 80th Cong. 2nd Sess., Investigation of Un-American Activities in the U. S., p. 22, attached to the affidavits of Quinn, Panzino and Fitzpatrick, respectively, as Exhibit 7.)

Federal government employees reasonably come to the conclusion that it would endanger their job tenure with the government if they in any way acted in a manner which could be considered to be a sympathetic attitude toward or treatment of a person accused of an offense arising out of an investigation of Communist activities. That would certainly be true of federal government employees who are members of a grand jury where their employer, the United 387
States Government, is the prosecutor, and where the offense is related to the investigation of Communist activities.

That a citizen in the impartial execution of his civic duties may have a cloud of suspicion as to his loyalty arise is demonstrated most vividly by the reaction against the presiding Justice in the first Hiss trial. Following the conclusion of that case in which the jury could arrive at no conclusion, members of Congress introduced a resolution

demanding the investigation of Justice Kaufman, impugning his loyalty solely because he attempted to exercise the functions of his office to the best of his ability. Furthermore, one of the jurors who had refused to vote for conviction against Alger Hiss was required to appeal to the law enforcement agencies for protection from those individuals who were harassing him because of that vote.

Only recently, when the Circuit Court of Appeals for the 9th Circuit granted bail to Harry Bridges, who was accused of perjuring himself with reference to Communist affiliation, U. S. Senator Langer on the floor of Congress demanded an investigation of those respected jurists. It is
389 in this atmosphere that a juror must attempt to arrive at an impartial and independent judgment of the facts. Difficult as it is for any citizen, it is well nigh impossible for federal employees.

For a number of years, federal employees have been subjected to loyalty oaths and tests and investigations of any possible sympathetic association with Communists, or beliefs allegedly of a communistic nature. However, with the adoption of the President's Loyalty Order of 1947, Executive Order 9835, federal government employees were subjected to the most intensive and searching investigation of their political beliefs and associations for the purpose of ferreting out and discharging those who were found, in the words of the President's Loyalty Order (Point V, Section 2),

390

> "F) Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association with any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General as totalitarian, communistic, fascist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other

persons from rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

In addition, the Attorney General was authorized to establish lists of organizations characterized by him as being "Communist," "totalitarian," "subversive," etc. Membership in or association with any such organizations was to be given serious consideration to ascertain whether a federal employee was loyal to the government or whether he should be dismissed from its employment. The Federal Bureau of Investigation was given the responsibility of investigating the loyalty of federal employees. 392

The very adoption of the Loyalty Order and the appointment of a Loyalty Board created a hysteria among government employees which in turn was reflected by and encouraged in the Washington public press and radio. Prominent citizens and leaders of the community throughout the nation attacked the Loyalty Order because of its lack of specification or limitation. It pointed out time and again that the Loyalty Order and what it implied would not only create an unhealthy terror in the minds of persons already employed by the government, but would prevent many loyal Americans from entering the government service under the ugly conditions implicit in the Loyalty Order and its proposed operations and functioning.

On the other hand, many others in the public eye, including a substantial part of the press, freely voiced their opinions for public consumption that employees of the federal government should in fact be subjected to the most rigorous and unlimited kind of investigation and interrogation as to their state of mind in respect to their political beliefs, opinion and associations, no matter how far removed, and that if there was any question whatsoever or any doubt about what they considered to be "loyalty," the 393

culprits should be summarily dismissed from their employment and in fact blacklisted.

Attached hereto as exhibits are typical comments as reflected in the press on the Loyalty Order. From the very day that the Loyalty Order was considered, the public press daily, and particularly in the District of Columbia, featured any news relating to the so-called "Loyalty Program" as it affected government employees and highlighted the evils or the benefits of such a program. What is significant is that these very conflicting points of view in and of themselves engendered further fears and an apprehension among government employees in respect to the retention of their
395 jobs as a means of livelihood (Exhibits 1, 2, 3, 4, 5, 6, 7 and 8).

The Report of the President's Committee on Civil Rights, 1947, page 51 states:

> "An employee whose loyalty is questioned is not charged with a crime. But loss of job and inability to obtain another one is a severe punishment to impose on any man. Accordingly provision should be made for such traditional procedural safeguards as the right to a bill of particular accusations, the right to subpoena witnesses and documents . . . where genuine security considerations permit . . . the federal government must maintain a loyalty program which adequately protects the civil rights of its employees."

396 On page 101, referring to the Loyalty program, the Report states:

> "The freedom of opinion and expression enjoyed by these people is in many ways dependent upon the attitudes and practices of the government."

Government employees recognized, as indeed they might, that as Circuit Judge Edgerton stated in his dissent in the *Bailey* v. *Richardson* case, 187 F. 2d 46, App. D. C.:

"Ostracism inevitably followed a dismissal . . . a disloyalty finding is closely akin to a finding of treason; the public hardly distinguishes between the two."

The actual functioning of the Loyalty Review Boards hardly dispelled the fears that were reasonably entertained by federal government employees.

At the very time that the Grand Jury in the instant case was considering whether to return indictments against this defendant, and almost a month before the indictments were actually returned, the U. S. Civil Service Commission reported publicly that 280 government employees had already been dismissed as security risks under the Federal Loyalty Program; that 13,202 employees had been the subject of full and complete investigation by the Federal Bureau of Investigation and other agencies; that 1,593 federal employees had resigned while under FBI investigation, and 1,171 federal employees had left their government jobs before the Loyalty Boards had completed their hearings. 398

This information could certainly not have been any comfort to the 10 government employees who were members of the Grand Jury which returned the indictment against this defendant or for the 2 housewives on the federal Grand Jury whose husbands were government employees. Out of the 23 members of the Grand Jury, 12, a majority, had reasonable grounds to fear that if they did not act in accord with the wishes of their government, personified by the federal prosecutor who presented the case for the government, they would become numbers in a list of those investigated or discharged by the federal government for "sympathetic association" with Communists or those accused of Communist beliefs or engaging in Communist activities and would thereby lose any source of livelihood for themselves and their families. 399

It became apparent that the only way that a government employee could possibly hope to safeguard his livelihood and the security of himself and his family was to express a hostility to any person, idea, or activity which could in any way possibly be construed to be of a "Communist" character. As a matter of fact, this was apparently made a requirement by those who were carrying on the so-called Loyalty Program. The hearings conducted by the Loyalty Review Board, which became the subject of common gossip and conversation among government employees in the District, corroborated this as a requirement. The most searching questions into the minds and the attitude of government
401 employees who were the subject of the investigation, or government employees who appeared as witnesses in these hearings, were a common routine at these hearings. For instance, a Chairman of a Loyalty Board made the following formal statement in respect to his understanding, as one charged with enforcing the Loyalty Program, of what loyalty meant. He said,

> "Loyalty to the United States is an instinctive matter. It is a matter of the mind and of the heart. I believe the way that one speaks an opinion on matters of strengthening the permanency of this government and protection of it are instinctive. It seems to me one ought to know right off at once how he feels about matters affecting the continuance and preservation of
> 402 our form of government, and that no one, it strikes me, individually ought to require time to make up his mind as to how he feels on a question like that."

Federal government employees had the privilege of reading in the daily press not only of the possible attacks on their loyalty through Loyalty Review Boards, but the constant and repeated investigations of the House Un-American Activities Committee and other committees of

Congress into the loyalty of government employees. (Hearings regarding Communism in the District of Columbia, Part I, Hearings before the Un-American Activities Committee, House of Representatives, 81st Con., 1st Sess., June 28, 29, July 6, 12 and 28, 1949; Hearings regarding Communism in the United States Government, Part 1, Hearings before the Un-American Activities Committee, House of Representatives, 81st Cong., 2nd Sess., April 21, 25, 29, May 4, 5, and 6, 1950; July 30 and Aug. 7, 1948; June 8, 1950; Export Policy and Disloyalty, Hearings before the Investigation Subcommittee of the Committee on Expenditures in the Executive Departments, U. S. Senate, 80th Cong., 2nd Sess., July 30, 1948; Hearings before 404
the Committee on Un-American Activities, House of Representatives, 80th Cong., 2nd Sess., Hearings Regarding Communist Espionage in the U. S. Government, Part II, December 7, 8, 9, 10, 14, 1948.)

Certain members of Congress repeatedly accused,—and with a great deal of attendant local and national publicity,—administration officials from the President of the United States down to the low est supervising officer of a government department of harboring government employees whose loyalty was in serious question. This attack brought with it the answer by officials of government that the accusations were not warranted and that in fact the government was constantly investigating its employees and weeding out those whose loyalty was in question.

Nor was it much of a comfort to federal government 405
employees to learn that the FBI was engaged in the greatest manhunt among Federal Civil servants that this country has ever experienced. (Department of Justice Appropriations for 1951, Hearings before the Subcommittee on Appropriations, House of Representatives, 81st Cong., 2nd Sess., pp. 225, 226.)

The director of the FBI himself has affirmed the fact that whenever a federal employee is accused of "Com-

munist affiliation," whether or not such accusations are based in fact, a full-scale investigation is instituted by the Bureau. Malicious accusations, gossip and rumor mongering, therefore, afford a basis for FBI investigation of a government worker. The awareness of such a fact is sufficient to cause a government worker to act in such a fashion that active hostility and lack of tolerance as to those accused of Communism is an evident characteristic of his demeanor, attitudes and actions. (*New York Herald-Tribune*, November 16, 1947, at p. 3.)

The records and public statements of the FBI indicate that it has a fingerprint collection estimated to be in the
407 neighborhood of 112,000,000 individuals; that the FBI has access to records of local police forces; has access to military records, employment rolls in large industrial plants; it exchanges information with industry and industrial associations; the FBI obtains data on the subversiveness of individuals from banks, business houses and railroads, that the FBI keeps dossiers and adds names to its files on the basis of information it receives regardless of the sources; that it utilizes the records and files of the House Un-American Activities Committee.

It might be noted that the vast majority of federal workers who are employed in Washington, D. C., reside in the District of Columbia. These employees do not have the right to cast a ballot to elect their representatives in Congress or the President of the United States. The
408 normal channels open to the average American citizen who wishes to express his disapproval of the policies and actions of his government, are not afforded these federal employees. Their community life as well as their employment is controlled and supervised by individuals and agencies against whom they have no recourse.

Under these circumstances a juror who is employed by the government may not render an impartial opinion, particularly in a criminal proceeding such as this. A federal employee serving on a grand jury who failed to indict at

the request of the government the defendant herein would have reasonable grounds for fearing that such refusal would be considered evidence in determining whether or not he was loyal to the United States government.

The FBI has investigated and checked every federal grand juror who is a government employee, and that person's employment is conditioned by a favorable report from that agency which is a subdivision of the prosecutor's office, the United States Attorney General's office. Information concerning "loyalty" of federal employees who are grand jurors is available to the Attorney-General's office prior to the time that grand juror is sworn in. And that grand juror remains under the surveillance of the FBI during his period of employment by the government. 410

Undoubtedly these investigatory activities of the government, the standards used in determining an individual's loyalty by the Loyalty Review Board, the clear policy of the federal government that it is at war with Communism at home and abroad, the demand of the federal government that all participate in this anti-Communist crusade has a two-fold influence upon the grand juror employed by the federal government. He faces an intensive barrage of anti-Communism which inevitably has the effect of promoting hostility against any individuals said to be associated with Communist activities. This has the effect of predisposing such a juror against any defendant who has been so characterized, even though that juror is not aware of any conscious bias against the defendant. Secondly, 411 he must consciously demonstrate an anti-Communist bias whenever confronted with an issue posed as related to Communism. Regardless of his personal predilections in the particular instance, he has reasonable grounds for believing that a vote of acquittal or no indictment could well serve as a basis for further investigation of his loyalty or as evidence to be used in proof of his alleged disloyalty.

It is respectfully submitted that the above demonstrates that bias, conclusively presumed as a matter of law, must

412 *Supplemental Affidavit of David Scribner.*

be attributed to the 12 of the 23 grand jurors who returned the indictment against this defendant and who are themselves government employees or whose spouses are government employees.

The motion to dismiss the indictment on the ground that the grand jury was illegally constituted should be granted, or in the alternative a hearing should be granted the defendant to prove by evidence that the said grand jury was illegally constituted.

DAVID SCRIBNER.

Sworn to before me this
17th day of January, 1951.

413

DAVID RATNER
Notary Public, State of New York
No. 41-3211050
Qualified in Queens County
Certs. filed with N. Y., Kings, Bronx and
Westchester Co. Clks.
Queens, Kings, N. Y. & Bronx Co. Registers
Commission Expires March 30, 1951

CERTIFICATE

We hereby certify that we have this 17th day of January, 1951, sent a copy of the foregoing affidavit, by official United States mail, to the United States Attorney and Assistant United States Attorney, addressed as follows:

414

1. George Morris Fay, United States Attorney.

2. Charles B. Murray, Assistant United States Attorney,
Office of the United States Attorney,
District of Columbia,
Washington 1, D. C.

DAVID SCRIBNER and
ALLAN R. ROSENBERG
Attorneys for Defendant

415

Exhibit 1 Annexed to Affidavit of David Scribner.

WHY GOVERNMENT EMPLOYES' MORALE IS LOW

Inside Washington:

(Copyright, 1947, by The Chicago Sun and The Newspaper PM, Inc.)

WASHINGTON

Morale among many Government workers is at a low ebb. Chief reason is the continued "loyalty" purge which struck again in the super-secret central intelligence group, where 14 were fired for "security" reasons.

Workers complain they don't know where the ax will fall next, or when they will be called to account for liberal or 416
new deal views. They don't put much stock in reassurances from department heads that their civil rights will be protected. The State Dept. purge has disillusioned them on this score.

The Civil Service Commission is aware of the unrest and the other day in a little-noticed speech in Pittsburgh the Commission president, Harry B. Mitchell, tried to put their fears to rest. Mitchell said that so far as 99 per cent of Government workers are concerned, the loyalty purge is ended.

According to the Civil Service Commissioner the purge was over for the vast majority when their fingerprints and loyalty questionnaires were filed.

"I may be too conservative", Mitchell said, "but my 417
opinion is that not more than a fraction of 1 per cent of the employees will have to be further investigated, and that the persons already known to be disloyal are only a small fraction of the above fraction."

He warned against any action by department heads which would make non-Communist workers with left-wing beliefs the "innocent victims" of the current purge and he added:

418 *Exhibit 1.*

"Let us keep in mind that the radicalism of today may become the progressivism of tomorrow and the conservatism of after years."

* * * * * *

Professional football coaches sadly in need of some bruising talent might well look over some of the prize rushers and blockers who regularly attend President Truman's news conferences.

The news conference at which Truman announced that he was calling a special session of Congress for Nov. 17 afforded some classy examples of broken field running and blocking in the rarefied atmosphere of the White House.

419 To begin with, reporters, being eager-beavers, collect before the door leading into Truman's office a few minutes before the conference begins. When the door is opened there is a mad stampede to be the first in to get a front-row standing place before the Executive desk. One reporter held his place in this rush only by a neat piece of blocking which threw another and more pushing reporter into the side of a door.

After the conference, the reporters made a dash for their telephones. One unwary miss who happened to be in the way was spun around a few times. Callers at the White House looked up in amazement as the reporters dashed through the large oval reception room.

A Secret Service man went over to one of them and said:

"I think it would be wise if you would keep seated for a

420 while."

421

Exhibit 2 Annexed to Affidavit of David Scribner.

N. Y. Herald Tribune 11/9/47

FEDERAL LOYALTY CHECK IS NO. 1 TOPIC IN CAPITAL

Some Government Employees Are "Bitter, Upset and Scared," Others See No Peril to Innocent: Press Criticizes Marshall and Truman

By Bert Andrews

WASHINGTON, Nov. 8—In this city of Washington, where 422
195,000 of the 2,000,000 civilian employees of the executive branch of the Federal government work and play and talk—talk, that is, when they're not too frightened to open their mouths—the burning topic of conversation this week has been the whole problem of security and loyalty.

Always the conversation gets around to one basic question. It can be put this way:

"Is there anything to be alarmed about, as far as the 195,000 employees here and the 2,000,000 altogether and the whole population of the nation are concerned, in the fact that certain State Department employees have been dismissed without ever having been informed of the charges against them?"

There are four schools of thought.

423 One school, exemplified by some of the top men in the State Department, insists there is no danger that such summary procedure will ever affect the completely innocent.

A second, exemplified by many of the lesser people in the department, is that a witch hunt is on and that it behooves them to keep quiet lest State Department investigators' ears be listening. (One man who left government service after years of work in two departments told this reporter: "I

424 *Exhibit 2.*

have talked to at least twenty State Department people in the past few days. They are bitter, upset and scared." This reporter and others in the Washington bureau of the New York Herald Tribune have talked to many more people in the department. All agree with the words "bitter, upset and scared.")

A third is the "so, what?" school—a very small one—which argues that it doesn't make much difference to the mass if a few innocent individuals get hurt, and that suspicion is as good grounds for dismissal as is proof.

The fourth school is perhaps best represented by editorial writers in three Washington newspapers who are demanding, with increasing firmness, that suspicion is not enough 425 and, in the demanding, are strongly criticizing either President Truman or Secretary of State George C. Marshall or both.

Representative opinions from all four schools will be presented here in the form of excerpts from statements, letters or editorials.

A large part of the comment resulted from the publication in last Sunday's New York Herald Tribune of the case history of the investigation and dismissal of a state department employee who can be described merely as Mr. Blank.

A large part of the comment will be news to President Truman and Secretary Marshall.

426

Samples of Thinking

Here are samples of the thinking of the schools represented:

School No. 1 (The "no danger" school.)—Secretary Marshall represented this. He acknowledged that eleven employees dismissed had no "true hearing." He said they could not be given the charges because the charges were

based on "highly classified material" not under the department's control. He left it doubtful that they could even learn the charges, even on appeal to the new loyalty review boards or the Civil Service Commission. 427

School No. 2 (The "we're scared" school).—Two letters typical of many received as a result of the Mr. Blank article show some of the mental turmoil.

First letter: "There's a lot more hidden, judging by what I observed in the last year—my last with the government. I saw but few of the 'loyalty investigation' files, but I saw the effects. In agencies covering the country, the subordinate officials who always did the best jobs were the ones terrorized. Terrorized by sudden questioning, to them inexplicable, by two suddenly appearing agents demanding to know: 'Who was with you at that meeting at ..... Street on the afternoon of Aug. 19, 1942? We know you were there. We took your car number.' The victim later drove to that address, which he had never heard of before, and tried to ascertain who lived there. Later I read the long dossier. Since the agency cleared the man, the only inference is that a lot of fabrication went into that case. There has been so much of it that I began to wonder what newspaper men might begin to lift the lid. As you know, fifty years ago France was torn by a social conflict between the powers of government, including generals, and the rights of the governed. The implement then was hysterical anti-Semitism, just as it is now hysterical anti-Communism, and, as now, heightened by the fears of 'military machinations of a foreign power.'" 428 429

430

Exhibit 3 Annexed to Affidavit of David Scribner.

THE WASHINGTON POST
Sunday, August 22, 1948

3B

MATTER OF FACT

WE DON'T WANT "LOYAL" NUMSKULLS

By JOSEPH AND STUART ALSOP

There is not the slightest doubt that in these times the American Government must have the right to protect itself from attacks from within. Recent reports in this space on
431 the loyalty case of "Mrs. Ann Smith" illustrate how stupidly this right can be abused. Yet the immensely delicate and difficult problem of national security exists, and it must somehow be solved.

No sensible man believes that J. Parnell Thomas' headline hunts can solve it. And anyone who believes that the solution is to be found in the present loyalty program should consider certain questions which the conduct of the loyalty program has posed.

First, there is the whole troubling question of guilt by association. Obviously, a man who has constantly associated with Communists and promoted Communist fronts should not have access to state secrets. But how far should this principle be carried?

432

THE BANKER'S BLOT

Take the recent case of a State Department employe. He was charged with having associated with 10 persons, all presumably suspect. He had never heard of five of them, and had had only the most casual contacts with four. But he had known one of the 10 intimately for several years.

This man was a banker, and stood high in the banking community, a community not conspicuous for its radical

tendencies. The State Department man could only defend himself by defending the banker, and neither he nor the banker had any notion why the banker was suspect.

It finally developed that the banker had lived briefly in Albuquerque, N. Mex., several years before, and that an anonymous landlady had reported to the FBI that he kept Communist literature in the basement. On further inquiry, it was established that the Communist literature consisted of accumulated copies of the New Republic which the banker had discarded.

This sort of thing is making the loyalty program a pretty sour joke. Moreover, the case of the State Department man is typical in that in the great majority of cases of guilt by association, at least half the supposed associates 434 are wholly unknown to the accused.

Second, it seems obvious enough that an intellectual pro-Communist, who accepts unhesitatingly the Communist dogma, should hold no sensitive position—this was the sort of individual who figured conspicuously in the Canadian spy case. But, again, how far should this principle be carried?

Here are a few verbatim quotes from recent loyalty hearings: "What type of books did your associates have—any political or social economy?" "What kind of books, by title, did you purchase, what kind of literature?" "How many copies of Howard Fast's novels have you read?" "Do you read the newspaper PM?" "Have you a book by John Reed?" 435

RESTRICTED TO DOLTS

All government employees know that such questions are asked in loyalty cases, and the assumption that any kind of intellectual or political curiosity provides grounds for suspicion is inevitable. If this country wants a Government service in which ignorance is at a premium, it will doubtless get what it deserves.

436 *Exhibit 3.*

Third, does it really matter in America whether a man's maternal grandparents came over from Poland, or whether all his ancestors landed decorously on Plymouth Rock? There have been countless instances when, during loyalty hearings, individuals have been asked where their parents and grandparents were born. An entirely American response would be that it was none of the loyalty board's damn business where a man's forebears came from.

Finally, there is the question of confrontation. Take the case of a man who has one item of "derogatory information" in his dossier. His file notes that FBI source X-32 has said that the accused is known to have attended a meeting
437 of high Communist leaders in Seattle. The accused man hotly denies it. The loyalty board has no way whatsoever of knowing whether X-32 or the accused man is lying, and the board knows nothing at all about X-32.

It is the FBI position that to allow those charged to confront their accusers might compromise FBI sources. This seems logical enough. It is also the FBI position that FBI agents should not be allowed to make estimates of the trustworthiness of their sources, and this, too, seems logical. Yet surely loyalty boards which must decide cases certain to affect the whole future of Government employes should know the identity of the sources of their information. They should also, in case of necessity, be able to confront and cross-question such sources in secret.

Obviously, there is no easy solution to the problem of
438 national security. But a government of drones and boneheads and toadies hardly contributes to national security. And if the sort of thing outlined above is allowed to continue indefinitely, that is the kind of government we shall get.

439

Exhibit 4 Annexed to Affidavit of David Scribner.

(The New York Times, 8/18/49.)

SCIENTISTS SCORE ORDER ON LOYALTY

Association Attacks Concept of Imputing to an Employe Beliefs of Associates

Washington, Aug. 18-'49 (AP)—The American Association for the Advancement of Science, the world's largest general organization of scientists, today assailed President 440
Truman's loyalty order affecting Federal employes as "basically objectionable."

The organization also strongly criticized the "security clearance" programs of the National Military Establishment and the Atomic Energy Commission as they affect scientists.

In a report published in the association's weekly journal, "Science," the group noted that Mr. Truman's loyalty order provides that no person shall be employed in a Federal post "if he is believed to be disloyal" to the United States Government.

"No one doubts the importance of faithful discharge of duty by public officials," the report said. "No one questions the propriety of the Government's demanding that its em- 441
ployes be loyal to their jobs and to the democratic institutions they serve.

"The loyalty order is, however, basically objectionable because it seeks to determine the employe's loyalty by inquiring into his supposed thoughts and attitudes, which are established in large part by imputing to him the beliefs of his associates.

442 *Exhibit 4.*

MAJOR CHANGES SOUGHT

"If the loyalty order is to be retained a drastic revision is essential. Instead of focusing on an employe's associations, it should focus on his behavior in overt acts. Legislation already on the statute books amply protects the Federal service against retention of employes who advocate overthrow of the Government."

The association said the Military Establishment's program allowed appeal only to military "tribunal" when a civilian scientist's clearance is disapproved, and it added:

"Such subjection of the destinies of civilians to military tribunals is contrary to national traditions."

443 Of the AEC's program, the association declared that "work in that field [atomic energy] will be shunned by men of ability and pride if they are constantly treated as objects of suspicion and possible calumny."

The statements were contained in a report drafted by the association's "special committee on civil liberties of scientists." Howard Meyerhoff, secretary of the association, said the report had been ratified by the governing council of the organization, which represents 24,000 members in 211 affiliated scientific organizations.

EXAGGERATION IS CHARGED

The report said the Atomic Commission "has recently
444 manifested a tendency to require security clearance not only for those scientists who themselves have access to restricted data, but also for their fellow-scientists with whom they may have personal contact."

"This apparently reflects a yielding to uninformed or sensationalist legislators and others who tend to exeggerate the problem of 'keeping our atomic secrets'," the report said. "So far as disclosures of evidence reveal, the problem

Exhibit 4. 445

of faithless scientific personnel in this country appears to be markedly less grave than the public has been led to suppose."

In another phase of its report, the committee asserted that "secrecy is damaging to both science and democracy," and added that it endorsed the 1947 report of President Truman's scientific research board which said in part:

"* * * Security regulations * * * should be applied only when strictly necessary and then limited to specific instruments, machines or processes. They should not attempt to cover basic principles of fundamental knowledge."

446

Exhibit 5 Annexed to Affidavit of David Scribner.

The Washington Post
Tues. 4/1/47

THE FEDERAL DIARY

By JERRY KLUTTZ

Loyalty Order Used as Blackjack for Jobs

LOYALTY? An attempt is being made by the unprincipled and the unscrupulous to use the President's loyalty order as a blackjack to get and keep Federal jobs. This is the sort of thing that's happening: 447

INCIDENT 1: A job was open in Commerce. The division chief talked with an applicant who wanted to transfer from a dying agency. The applicant appeared qualified and the official told him to return in a few days. Meantime, the chief checked the employ of the applicant, and he got this answer:

448 *Exhibit 5.*

"I couldn't possibly recommend that person; he has broken every rule in the books, and if this agency wasn't going to fold up soon I would be compelled to fire him."

When the applicant returned to Commerce, he was told by the division chief that no job was available as it had been decided to abolish the vacant position. The crestfallen applicant went away. But it wasn't long before he returned to the outer office to cry out to several staff members—words he knew would get to the chief promptly:

"Your boss lied to me; he said he didn't have a job open here, and I know he does have. Now I'm going to tell you something—your boss is a Communist, and it's like every
449 Communist to lie, lie, and lie. Unless I get a call damn soon from your boss to tell me that the job here is mine, I'm going to report him to both the House Committee on Un-American Activities and the American Legion and he'll be investigated out of his job."

Many a chief would have weakened under the circumstances. But to his everlasting credit, the Commerce official stood by his guns. He was reported, however, as both a Communist and anti-veteran by the applicant. The official, a veteran himself, happened to be acquainted with people in both groups who knew the charges were screwy—but a lot of other loyal and able officials aren't so fortunate.

INCIDENT Two took place at the State Department. The
450 person involved was given a 90-day temporary assignment which he tried to get converted into a permanent job. As the 90 days neared an end, the employee was told his job was done, and besides, the department didn't have the money to keep him. But the employee wouldn't take no for an answer, and he launched this counterattack:

"I don't like the tone of the reports that are being written in this office," he began, "they are obviously slanted in favor of Russia, and they are written by people who are sympa-

thetic with the Reds. I've been debating," he said, "whether to take this condition to some of my friends in Congress."

Being something of a diplomat, the temporary employee dropped the hint that he could see the reports as fair and objective if his temporary assignment was made permanent.

P.S.: I don't know the final chapter in this story—other than the threats frightened the entire office which merely boils down reports that come into the department the world over.

INCIDENT 3 covers a score or more of agencies. An organization, generally respected, is using a blackjack to run out Government people it doesn't like. So, it's using what it believes is an expedient method by calling these people Communists. 452

The outfit works like this: One of its representatives calls on the department head to give him a list of employees in his agency which it claims are Communists. The demand is made that either the people be fired immediately, or the organization will get a congressional committee to investigate.

CONCLUSION: All this should be a warning to congressional committees and individual members of Congress that they will turn over Government to the crackpots if they listen and follow through on every Communist complaint made to them. In each of the incidents cited above, the cooperation of Congress, or even a single member, is all important to carry out their aims—and this cooperation should never be given without supporting facts. 453

Fully half a dozen congressional committees are investigating some phase of employee loyalty. What satisfies one congressional committee is objected to by another. The agencies are in a spot where they can't win.

454

Exhibit 6 Annexed to Affidavit of David Scribner.

The Washington Star
Nov. 1949

OUTDATED RIGHT OF PRIVACY

Loyalty Checks Seen Making Business of Citizen That of Government, Too

By Thomas L. Stokes

The times are out of joint for some of us around here of another generation who were raised in the tradition, and
455 crusaded for it, that American citizens are entitled to privacy of their opinions and beliefs and could think and say what they pleased without being molested or spied upon or subjected to eavesdropping by minions of the law.

But it's a new world, not a brave new world, nor even the more comfortable world before our two global wars and their so-called "ideological" conflicts, but a world of fear and distrust. We'll probably have to get used to it and keep our mouths shut, but we don't have to like it.

These observations, which are philosophically resigned, are provoked by two recent developments here showing the temper of our times.

One is the movement for a permanent Federal loyalty program to pass upon Government employes. It started over in the Pentagon where our military brass throws its
456 weight around as if the war still were on and now has the approval of Seth Richardson, chairman of the Loyalty Review Board appointed by the President, which has about finished its job of combing through the nearly 3,000,000 Government employes in its search for "disloyalty."

Exhibit 6. 457

Wire Tapping Approved

The other is Attorney General McGrath's acquiescence, after a review of FBI wire tapping methods and procedures, to continue wire tapping. It is known that the Attorney General, soon after he took office, was inclined to favor ending this practice, though he reserved final opinion until the review which he now has made.

Wire tapping..as now practiced, is presumably restricted and circumscribed. It can only be done after approval of the Attorney General in each specific case and is supposed to be confined to cases of espionage, sabotage and kidnapping under a rule of thumb laid down by former Attorney General Francis Biddle. 458

It came back into use for war purposes and was approved by the late President Roosevelt. The war is over. But the present Attorney General bases his certification for continuance on "the emergency which still prevails and the necessity of protecting the national security." That obviously means the so-called "cold war" which, of course, may continue for some time. Arnold Toynbee, the famous English historian, figures perhaps half a century.

Evidence obtained by wire tapping is not admissible in courts under a Supreme Court decision which was an issue in the Judith Coplon-Valentin Gubitchev trial in New York where it was revealed that the FBI did lots of wire tapping, including telephone conversations between counsel and client.

459

FBI Does Investigative Work.

Making the loyalty network permanent is involved in a pattern with the FBI and its activities. The FBI does the investigative work for the loyalty board. Together they constitute a Federal super-police system which seemingly is to go on in our Government. Some of the things

460 *Exhibit 6.*

that have leaked out of the loyalty board, the prying into private lives, opinions, political activity and reading habits, indicate the danger of abuses in such a system under permanent status, especially with the inadequate legal protections for any one caught up in it, no matter how innocently.

There is no way to turn the light on it, as there is no way to find out how carefully the FBI uses the wire tapping technique. Such operations are all secret and newspapers have virtually no way of keeping on them that check which is so essential in a democracy.

The exhaustive inquiry into nearly 3,000,000 Government
461 employes found only a handful of "loyalty" risks or, in other words, the Government service was, according to the FBI, 99.6 per cent pure, which seems pretty good. Why could not the ordinary procedures for checking Government personnel, including that of the Civil Service Commission, serve adequately in peace time, as they did for so many years? The commission has ample powers.

But that is perhaps just an old-fashioned idea that takes too little account of the strange fears abroad in the world today which have had a slowly deteriorating influence on American democracy as we of another generation knew it.

Please forgive us old fogies. We'll try to keep our mouths shut and our powder dry.

462

463

Exhibit 7 Annexed to Affidavit of David Scribner.

The Washington Post
Thursday 11/20/47

WASHINGTON CALLING

By MARQUIS CHILDS

Heresy Hunt

To CARRY OUT the European recovery program will call for the very best brains in this country. That is one fact about which no one can possibly disagree.

It calls for economic as well as political specialists. Practical men with business experience will be called upon. There will be need, too, for those with academic and theoretical training, familiar with the trend of the European economy over a long period. 464

This is part of the responsibility that has fallen on the United States. It goes along with the greatest accretion of economic, industrial and technological power the world has ever seen. We are only just beginning to realize what that responsibility means.

In the light of that responsibility and the demand it is certain to make on our brains and our skills we cannot afford the kind of witch-hunting that has created something like a crisis in Government. A way must be found to resolve the suspicion and uncertainty which becloud Government service today. 465

Good men, men with independent minds, will not come into Government service under such circumstances. The financial sacrifice is, in most cases, too great to expect that the citizen will subject himself to having his conscience and his thoughts combed for possible heresy.

The cases that come immediately to mind are those of the 11 State Department employes dismissed because they were believed to be disloyal or because they were "bad

466 *Exhibit 7.*

security risks." Even if Congress eventually puts the administration of the European Recovery Program in a new agency, the State Department is certain to need able new recruits.

-:-

YET EMPLOYES of the department are subject to dismissal without being given an opportunity to know the cause. Bert Andrews of the *New York Herald Tribune* performed an important service in presenting one of these cases in detail, protecting, of course, the identity of the individual involved.

The documents in that case showed how tenuous were the grounds for the man's dismissal. He was shadowed for
467 eight months by the FBI. Yet what they found, insofar as it was revealed by the questions asked of the individual, was vague and shadowy. Most of the questions dealt with associates whom he had seen at infrequent intervals.

In June of 1945, five men and one woman were taken in an FBI raid. Two of the men were State Department employes and one a naval officer whose loyalty had never hitherto been questioned. They were stripped and treated like common criminals.

The charges against the three proved baseless. A grand jury subsequently cleared them for lack of evidence. The damage of publicity had, of course, seriously harmed them and there was no way in which they could be compensated for this damage.

But at least they were cleared. The public could know
468 that, after due legal process, they were found to be without guilt.

-:-

THE RECENT loyalty dismissals were harsher and more cruel, particularly since potential employers are told that the dismissed men were found to be "bad security risks." The State Department permitted three of them to "resign without prejudice," and now has granted the same permission to seven others because, through a technicality, their

cases do not come under the jurisdiction of the recently appointed Loyalty Review Board. 469

The department states that it is taking steps to insure that, in the future, its employes will have the right to appeal to the Loyalty Review Board. However, review by the 20-man board is bound to be slow and cumbersome. Delays will work hardships on individuals and will impede the whole process of Government.

The heresy hunt has already had that effect. Government agencies seeking new employes for specialized jobs find that getting them cleared is an interminable business.

One agency recently sought to employ a young economist. He had a good combat record in World War II, with several citations for bravery under fire. But the report from the Civil Service Commission cast doubt on him because five years before the war, when he was just out of college, he was "in association" with the "Communist-dominated" American Civil Liberties Union. The American Mission to Greece also has been hampered in assembling a suitable staff by the cumbersome security machinery in the State Department. 470

The whole thing can be put simply. We will not be able to do the job that is ours in the world today if we do not cure ourselves of the current case of jitters. Those who are exploiting it for political purposes are playing directly into the hands of the Communists who would isolate America. It is long past time to apply plain common sense. 471

472

Exhibit 8 Annexed to Affidavit of David Scribner.

Washington Post
12/30/47

ELAXER HITS LOYALTY TEST DIRECTIVES

Abram Flaxer, president of the CIO United Public Workers, last night charged that the rules issued Saturday by the Loyalty Review Board are "mere window dressing" for police state procedures.

"It is obvious," he said in a statement, "that a facade of sham hearings and procedures have been erected to hide the real situation—that a police agency, the Federal Bureau of
473 Investigation—now has sole and exclusive authority to render judgment on the loyalty of Government employes.

"The public had been led to believe the appointment of this board would result in the establishment of procedures guaranteeing Government employes the basic civil rights all Americans have enjoyed under our Constitution . . . The board has done nothing to allay the just suspicions which had previously been expressed . . .

"Of what use are three hearings or appeals if the accused is denied the right to confront the witnesses against him and deprived of the right of cross-examining such witnesses? . . .

"The hearings and appeals boards are in the same position as a jury in a murder trial that has been instructed to
474 find the accused guilty on the basis of nothing more substantial than a secret report from the chief of police saying that he has information as to the guilt of the accused from an anonymous witness whose identity cannot be disclosed. . . ."

Exhibit 8. 475

N. Y. Times
12/29/47

FORTAS CRITICIZES LOYALTY METHODS

Special to THE NEW YORK TIMES.

WASHINGTON, Dec. 28—Procedures for testing the loyalty of Government employes announced yesterday by the new Loyalty Review Board drew the criticism tonight that they raised "serious problems" in the safeguarding of constitutional liberties.

Abe Fortas, former Under-Secretary of Interior, predicted that under the board's rules the right of an accused 476
employe to be accompanied by his lawyer when appearing before the board would be "largely empty."

Mr. Fortas is one of three attorneys and former high officeholders who represented six State Department employes when they were dismissed for security reasons last summer.

"It is doubtful if a lawyer can be of very much help to a person accused of disloyalty if he is to be denied the right to confront his accusers, or the opportunity to cross-examine witnesses," Mr. Fortas commented. He also charged that the board's decision not to disclose to the accused the source of its evidence was in violation of the Bill of Rights.

Mr. Fortas attacked particularly the board's rule that accused persons would not be permitted at any time to inspect 477
any report made against him by the Federal Bureau of Investigation, which will do virtually all the investigative work in the Government's unprecedented loyalty program.

478

Order Denying Motion to Strike.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. PHILIP BART	Cr. No. 1746-50

ORDER

479

Upon consideration of the Government's motion to strike all reference to testimony of defendant and proceedings before the Congressional Committee (Defendant's Motion to Dismiss 1-6, 7, 8, 9; Points and Authorities 3, 4), and upon argument of counsel, it is by the Court this 19th day of January, 1951,

ORDERED that the said motion to strike be and the same hereby is denied.

JAMES R. KIRKLAND
Judge

480

481

Order on Motion to Dismiss Indictment.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

United States of America	
v.	
Julius Emspak	Criminal No. 1742-50
Thomas J. Fitzpatrick	Criminal No. 1743-50
Thomas Quinn	Criminal No. 1744-50
James J. Matles	Criminal No. 1745-50
Philip Bart	Criminal No. 1746-50 *
Frank Panzino	Criminal No. 1747-50
Talmadge Raley	Criminal No. 1748-50
Pasquale L. J. Branca	Criminal No. 1749-50
Clarence Hiskey	Criminal No. 1750-50
Esther Tice	Criminal No. 1751-50
Frank Hashmall	Criminal No. 1752-50
Louise Berman	Criminal No. 1753-50
Steve Nelson	Criminal No. 1796-50
Giovanni R. Lomanitz	Criminal No. 1797-50
Marcel Scherer	Criminal No. 1799-50
David J. Bohm	Criminal No. 1824-50

482

483

Order and Opinion

The above defendant was one of sixteen indicted by the Grand Jury of this Court for contempt of Congress (2 U. S. Code 192) for failure to answer questions before a duly created sub-committee of the Committee on Un-American Activities of the House of Representatives, pursuant to Section 121 of the Legislative Re-organization Act

484 *Order on Motion to Dismiss Indictment.*

of 1946, sub-section (q) (2), and House Resolution 5 of the 81st Congress.

The defendants have filed motions to dismiss and alternative motions in the several cases for a bill of particulars and to have a hearing to show bias and prejudice on the part of members of the Grand Jury which returned these indictments.

Upon consideration of the argument of counsel, the indictment, and the several motions and memoranda filed herein, it is by the Court, this 26th day of January, 1951,

ADJUDGED, ORDERED AND DECREED as follows:

485 (1) Section 192, Title 2, of the United States Code is constitutional, and does not exceed the bounds of the constitutional power of Congress to investigate in aid of its legislative jurisdiction; nor is it vague and indefinite; nor does it violate the First Amendment to the Constitution of the United States. *Barsky* v. *United States,* (1948) 83 U. S. App. D. C. 127, cert. den. 334 U. S. 843; *United States* v. *Josephson,* (1947) 165 F. (2d) 82, cert. den. 333 U. S. 838, rehear. den. 333 U. S. 858; *Eisler* v. *United States,* (1948) 83 U. S. App. D. C. 315, 170 F. (2d) 273, cert. den. 333 U. S. 838; *Morford* v. *United States,* (1950) 339 U. S. 258, rehear. (1950) ..... U. S. App. D. C. ....., 184 F. (2d) 864, cert. den. (Nov. 6, 1950) 71 S. Ct. 130; *Trumbo* v. *United States, Lawson* v. *United States,* (1949) 85 U. S. App. D. C.
486 167, 176 F. (2d) 49, cert. den. (1950) 339 U. S. 934.

(2) Section 121 of the Legislative Re-Organization Act of 1946, sub-section (q) (2), and House Resolution 5 of the 81st Congress creating the House Committee on Un-American Activities, is constitutional. *Barsky* v. *U. S.*; *U. S.* v. *Josephson; Eisler* v. *U. S.; Morford* v. *U. S.; Trumbo* v. *U. S.,* and *Lawson* v. *U. S., supra.*

(3) The above indictment does charge an offense under the laws of the United States. It is a good example of a "plain, concise and definite written statement of the essential facts constituting the offense charged." (F. R. C. P., Rule 7 (c).) It should enable the defendant to understand the nature of the accusation; it affords adequate notice of the offense with which defendant is charged; it gives defendant the information needed to prepare his defense, and makes it possible for him to plead a judgment in bar of another prosecution for the same offense, and is accordingly legally sufficient. *U. S.* v. *Josephson, supra.*

(4) In the absence of a showing of actual bias on the part of the members of the Grand Jury due to their employment in the Government of the United States or the Government of the District of Columbia, the indictment is not void. *United States* v. *Wood,* (1936) 299 U. S. 123; *Frazier* v. *United States,* (1948) 335 U. S. 497; *Dennis* v. *United States,* (1950) 339 U. S. 162. In a particular case Government employees serving as Grand or Petit Jurors might be barred for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors. No such circumstances are present under the force of the present motion to dismiss, nor were any such circumstances indicated in defendant's proffer of proof in support of the motion for a hearing on the qualifications of the Grand Jurors. 488 489

(5) No showing having been made to require the Government to file a bill of particulars, that portion of the motion seeking the same will be denied.

(6) The Court reserves for a further opinion on the force of the motion to dismiss as to whether the indictments charge one or a multiple series of contempts, and also upon

the question of whether a witness properly before a committee of Congress who claims his immunity under the provisions of the Fifth Amendment to the Constitution can receive judicial punishment under indictment for contempt of Congress.

It has been suggested that the Court take judicial notice of the proceedings before Congress. However, since the indictment is under attack by a motion to dismiss, the Court will not go outside the record at this time to judicially notice such matters.

All other matters not heretofore expressly ruled upon or reserved for further consideration which have been raised
491 in the several motions to dismiss are accordingly overruled.

/s/ JAMES R. KIRKLAND
Judge.

(James R. Kirkland)

492

493

Opinion on Motion to Dismiss Indictment.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	
JULIUS EMSPAK	Criminal No. 1742-50
THOMAS J. FITZPATRICK	Criminal No. 1743-50
THOMAS QUINN	Criminal No. 1744-50
JAMES J. MATLES	Criminal No. 1745-50
PHILIP BART	Criminal No. 1746-50
FRANK PANZINO	Criminal No. 1747-50
TALMADGE RALEY	Criminal No. 1748-50
PASQUALE L. J. BRANCA	Criminal No. 1749-50
CLARENCE HISKEY	Criminal No. 1750-50
ESTHER TICE	Criminal No. 1751-50
FRANK HASHMALL	Criminal No. 1752-50
LOUISE BERMAN	Criminal No. 1753-50
STEVE NELSON	Criminal No. 1796-50
GIOVANNI R. LOMANITZ	Criminal No. 1797-50
MARCEL SCHERER	Criminal No. 1799-50
DAVID J. BOHM	Criminal No. 1824-50
FREDERICK V. FIELD	Criminal No. 1785-50
PHILIP J. JAFFE	Criminal No. 1786-50
WILLIAM L. PATTERSON	Criminal No. 1787-50

494

495

OPINION

The first sixteen above-named defendants were indicted by the Grand Jury of this Court for contempt of Congress (2 U. S. Code 192) for failure to answer questions before a duly created sub-committee of the Committee on Un-

American Activities of the House of Representatives, pursuant to Section 121 of the Legislative Re-organization Act of 1946, sub-section (q) (2), and House Resolution 5 of the 81st Congress; the last three above-named defendants were indicted by the Grand Jury of this Court for contempt of Congress for failure to answer questions before a duly created sub-committee of the Committee on Foreign Relations of the United States Senate which was conducting hearings pursuant to Senate Resolution 231, 81st Congress, 2nd Session. Title 2, Section 192, of the United States Code provides:

> "Every person who having been summoned as a wit-
> 497 ness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully makes default*, or who, *having appeared, refuses to answer* any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor * * *." (Emphasis supplied.)

Defendants herein have filed motions to dismiss the indictments pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

Each indictment contains several counts ranging up to as high as 68 counts in one case. Counsel for defendants
498 urge that these indictments are duplicitous in that they charge one crime in several counts and also that they put the defendant in jeopardy of being convicted and punished more than once for the same act. The Government counsel argues that since the statute, 2 U. S. C. 192, *supra*, defines the crime as the refusal to answer "any question", then each refusal to answer a different question would be a separate violation.

In *Upshaw* v. *U. S.*, (1946) 157 F. (2d) 716, the Court set out the test for determining the identity of offenses as follows:

> "And the generally recognized test for determining whether the offenses charged in two or more indictments or in different counts of the same indictment are identical or separate is whether the same proof would sustain a conviction under both or whether each requires proof of one or more facts which is not required of the others. *Blockburger* v. *U. S.*, 284 U. S. 299; *Gilmore* v. *U. S.*, 124 F. (2d) 537." Ibid, p. 717.

As contended by the United States in this proceeding, if 500
a witness refuses to answer any question he has violated the statute. Clearly it is necessary to prove a different fact to sustain the charge for each different question. Applying the above test to the indictments in these cases, the refusal to answer each question must be charged in a separate count since the same proof would not sustain a conviction under each count, and an indictment charging more than one offense in any one count is as defective as an indictment charging a single offense in multiple counts. In several recent cases involving contempt, indictments setting forth the several questions which the defendants refused to answer were held valid. *Alexander* v. *U. S.*, (1950) 181 F. (2d) 480; *Doran* v. *U. S.*, (1950) 181 F. (2d) 489; *Kasinowitz* v. *U. S.*, (1950) 181 F. (2d) 633; *Trumbo* v. *U. S.*, 501
(1949) 85 U. S. App. D. C. 167.

Counsel for defendants go a step further, however, and urge that a conviction on each count would allow the Court to incarcerate some of these defendants for the balance of their lives. Although the problem of the sentence after conviction is not before the Court at this time, it does appear that a short discussion of this problem as collateral to the allegation of duplicity may be helpful.

Diligent effort on the part of counsel has produced a series of cases which are pertinent here. One of the earliest cases to consider this precise problem was *Maxwell* v. *Rives*, (1876) 11 Nevada 213. In this case the defendant was held in contempt of court for refusing to answer a number of questions. In considering the trial court's action in imposing a separate penalty for each refusal the court said:

> "A penal statute must be strictly construed. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial of the same issue cannot be
> 503 deemed more than one contempt, no matter how many questions he may refuse to answer * * * The district judge erred in finding that each separate refusal to answer a question was a distinct contempt * * *." Ibid. p. 221.

The Court there cited *People ex rel., Tweed* v. *Liscomb*, (1875) 60 N. Y. 559, in which opinion may be found a collection of English and early American cases which involved multiple penalties for a single act.

Recently the United States District Court for the District of Hawaii considered indictments identical in substance to those before the Court now, and that court held in respect to the multiple count indictments as follows:

> 504 "As to objections to the number of counts, the Court is of the opinion that the Government has the right to frame each refusal to answer in a separate count. Rule 8 of the Federal Rules of Criminal Procedure gives that right. However, as the questions appear to be directed all to one subject of inquiry and the answers were simultaneous during the proceedings, and continuous acts, the indictments therefore charge only one alleged offense. *Kerr* v. *Squier*, 151 F. (2d) 308 (Ninth

Circuit): *Price* v. *U. S.*, 150 F. (2d) 283-285 (Fifth Circuit); *Upshaw* v. *U. S.*, 157 F. (2d) 716 (Tenth Circuit) strongly indicate that no matter how many refusals to answer may occur in an examination such as is alleged, the maximum sentence that could be imposed pursuant to the statute involved, Section 192, Title 2, U. S. Code, would be punishment for not more than one refusal." *U. S.* v. *Yukio Abe*, Crim. No. 10,335 (Nov. 17, 1950).

Accordingly, the District Court of Hawaii refused to dismiss the indictments on the ground of duplicity, and deferred ruling on the motion to dismiss until after a trial on 506
the general issue.

Two recent State cases, *Fawick Airflex Co.* v. *U. E. R. & M. W. A.*, (1950) 92 N. E. (2d) 436 (Ohio) and *People ex rel. Amarante* v. *McDonnell*, (1950) 100 N. Y. S. (2d) 463, considered a charge of separate contempts for refusal to answer a series of questions. Both courts held that only one contempt was committed and the defendant could receive only the maximum penalty for one contempt, after conviction. In the Fawick case, the court rationalized the problem as follows:

"as heretofore noted in this opinion, the appellant was found guilty of three separate acts of contempt based upon his refusal to answer three separate questions.

It appears to the members of this court that the ques- 507
tions were of such character that they should be treated as an inquiry into but one single subject. The first question asked the witness directly was whether he was a member of the Communist Party. When he refused to answer, other questions were then asked, which, if answered in the affirmative, would have established an inference that he was such a member. In fact, the entire inquiry was directed toward the estab-

lishment of but one fact. The witness' refusal to answer the three questions under discussion constituted, in the opinion of the members of this court, but a single contempt, for the reason that they all had to do with the same subject matter."

The New York court considered the problem in the same light, saying:

"The question then presents itself as to whether or not by refusing to answer seven questions relating to the same subject matter the relator was guilty of seven separate and distinct contempts. If this question be
509 answered in the negative, then the County Judge acted in excess of the jurisdiction conferred upon him in sentencing the relator to a term in excess of the maximum provided by law for a criminal contempt.

The court is of the opinion that the relator committed but one contempt. To hold otherwise would enable a prosecutor to ask an unlimited number of questions concerning the same subject matter or even to ask the same question in various forms, with the net result that a witness might be incarcerated for the balance of his life."

The New York statute on contempt is the Judiciary Law Section 750, which reads:

510 "A court of record has power to punish for a criminal contempt a person guilty of either of the following acts, and no others:

* * * 5. Contumacious and unlawful refusal to be sworn; or, after being sworn, *to answer any legal* and proper interrogatory." (Emphasis supplied.)

Title 2, U. S. Code 192, *supra*, uses the word "any" in the same sense as the New York statute, yet the indictment in the Amarante case was not held defective for duplicity. The court in these two cases obviously directed their concept of the singleness of the offense to the imposition of the penalty.

In *Trumbo* v. *U. S.*, *supra*, the indictment was in two counts consisting of two separate questions which defendant had refused to answer. The court, at page 169, said, referring to two defendants, Lawson and Trumbo: "Both trials resulted in convictions and the imposition of the maximum sentence allowed by 2 U. S. C. 192 of one year and $1,000 fine". The court without discussing the problem obviously approved conviction under the two count indictment and also imposed a sentence of the maximum penalty for a single contempt. That decision is binding upon this Court and it is also well supported as pointed out by the foregoing discussion. 512

The counts involved in the several indictments under consideration consist of questions which apparently on their face were directed to one single line of inquiry which was the specific phase of inquiry then being considered by the Committee. As noted previously, each question requires proof of a different fact; therefore, the questions must be set out in different counts. This being so, the indictments are not duplicitous. Proof which would sustain any single count will sustain a conviction for contempt as charged. 513 The question of double jeopardy will arise only if a defendant is sentenced on more than one count. Since only one contempt is charged in each indictment, the rationale of the decisions discussed above would seem to limit the sentence to a maximum penalty for one contempt. The objection is academic and premature at this stage, however, but may be raised if a sentence for more than one refusal is imposed.

Counsel have also argued that the claim of protection against self-incrimination embodied in the Fifth Amendment entitles a witness before a Congressional committee to an immunity which will support a dismissal of an indictment charging violation of 2 U. S. C. 192 prior to a trial of the general issue. This contention raises a procedural question, the solution to which requires a consideration of the preliminary facts, which must be established as a matter of law to support the granting of such a motion.

The necessity for the right of a legislature to conduct inquiries as an aid to the legislative process is more critical
515 now than at any time in the history of the world. The complexities of our present economy, the attempts of modern statesmen to achieve international unity and the recurrence of the concept of a balance of power throughout the world render any single group of men incompetent to deal with the legislative process without the aid of detailed inquiries into the fields of prospective legislative control. Such responsibility as falls on the members of our legislatures, demands the authority to compel disclosures of pertinent information relative to the requirements of the law making process.

In the formation of the Constitution of the United States, the citizens of the several states were anxious that their individual liberties, so recently gained by the American Revolution and which they had protested to the imperial
516 heads of England, should not be lost in the untried Federal Government which the Constitution established. Accordingly, the first ten amendments were voted at the outset of the ratification of the Constitution, and they apply strictly to the Federal Government. The Fifth Amendment declares:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled, in any criminal case, to be a witness against himself*, nor be deprived of life, liberty or property, without the due process of law, nor shall private property be taken for public use without just compensation." (Emphasis supplied.)

In the early stages of the development of the common law, a defendant in a criminal case was not permitted to testify nor be represented in court by counsel. When one further 518 considers that the grand jurors were persons who had actual knowledge of commission of crimes in their locality and were assembled in advance of the king's justices, then moving in circuits, one can understand the reluctance of the American colonists to permit the Federal Government to compel a defendant in a criminal case to give testimony against himself. It was anciently established that no person should be compelled to give testimony against himself. This came about as orderly progression of the growth of criminal procedure as a part of the common law. However, it appears to be of a more recent origin than the next point to be discussed insofar as the ratification of the Constitution was concerned.

Growing up with the development in the criminal law, 519 but ancient by many years, was the proposition that there was an inherent right in Government to subpoena and inquire of citizens concerning activities for which legislation was necessary. This information was then, as it is now, vital to the legislative process. The earliest instances of punishment visited by the House of Commons upon contumacious and prevaricating witnesses summoned before Parliamentary inquiries related to disputed elections. The

earliest recorded instance appears in the year 1586. Later, in 1604, in Sir Francis Goolwin's case, where Parliament was inquiring into election irregularities, it was stated: "Power given in that Case to send for an Officer, and to view and search any Record or other thing of that kind, which may help their Knowledge or Memory in this particular Service". On June 4, 1621, Randolph Davenport was imprisoned for misinforming a committee before whom he was called as a witness. There was a Parliamentary investigation in 1688 into the conduct of the war in Ireland. There also appears to have been legislative power as early as 1789 in the American colonies, and it was well entrenched when
521 the Constitution was ratified. Undoubtedly, the framers had its ancient origin in mind as it laid the framework of the American Federal Government.

These two streams of social control flowed parallel to each other in their development through the centuries. This development has been the subject of careful study by many scholars, and is thoroughly discussed in *Landis, Constitutional Limitations on the Congressional Power of Investigation*, 40 Harvard Law Review 153 (1926). It is now well established that Congress has the power to compel pertinent disclosures. *McGrain* v. *Daugherty*, (1927) 273 U. S. 135; also that a Congressional inquiry may be as broad as the legislative purpose requires *Townsend* v. *United States*, (1938) 95 F. (2d) 352; and that a legislative purpose will be presumed in authorizing a Congressional in-
522 vestigation. *In re Chapman*, (1897) 166 U. S. 661. The pertinency of the evidence is not determined by its probative value, and like the question of relevancy in a trial, it is a question of law; but the witness may be punished if he mistakes the law, since the issue of good faith is not involved. *Sinclair* v. *U. S.* (1929), 279 U. S. 263. The witness of course must be properly before the committee either by reason of service of process or by voluntary appearance.

The proceedings before the committee is informal, but precedent has fully established the practice of informing a witness of his rights of immunity at the hearing. A claim of immunity under the Fifth Amendment is personal to the witness. *Brown* v. *Walker*, (1896) 161 U. S. 591.

If there has been any doubt that the Fifth Amendment applies to testimony before Congressional committees, it has been dispelled by many decisions, and in fact, was recognized by Congress itself in 1857 when it enacted an immunity statute, 11 Stat. 155, from which R. S. 859, codified in 18 U. S. C. 3486, stems. It provides:

> "*No testimony* given by a witness before either House, or before any committee of either House, or before 524
> any joint committee established by a joint or concurrent resolution of the two Houses of Congress, *shall be used as evidence in any criminal proceeding* against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." (Emphasis supplied.)

The avowed purpose of that Act was to "enforce the attendance of witnesses * * * and to compel them to discover testimony". Congress thus sought to compel testimony which might be protected by the Fifth Amendment by granting the immunity of R. S. 859. To this day that section remains virtually as enacted as 18 U. S. C. 3486, untested by Court decision although relegated to a doubtful 525
status by *U. S.* v. *Bryan*, (1950) 339 U. S. 323. In that case the court considered 859 by analogy to R. S. 860, a statute identical in all material respects with R. S. 859, and which was considered in *Counselman* v. *Hitchcock*, (1892) 142 U. S. 547. The court in this latter case held that R. S. 860 was not an adequate substitute for the protection of the Fifth Amendment regarding self-incrimination. In *U. S.* v. *Bryan*, *supra*, Mr. Chief Justice Vinson,

speakin ; for the majority of the Court, went beyond the issues involved to indicate that R. S. 859 is no more of a substitute than was R. S. 860. The Congress repealed R. S. 860 in 1910.

On the other hand, immunity statutes have been enacted in regard to administrative hearings which do afford an adequate substitute for the Fifth Amendment. In *U. S.* v. *Eisele*, (1943) 52 F. Supp. 105, decided by Judge Pine of this District Court, a prosecution was barred because of testimony given under the immunity of 15 U. S. C. 77v. (c). Similarly, in *Smith* v. *U. S.*, (1949) 337 U. S. 137, a prosecution was barred by the immunity of 49 U. S. C. 46.

527 The two immunity statutes cited above contain the words "no person shall be prosecuted for or on account of any transaction, matter or thing, concerning which he may testify". This remission of responsibility for criminal acts met the absolute test of the constitutional provision against self-incrimination as early as *Brown* v. *Walker*, *supra*, and as recently as *Smith* v. *U. S.*, *supra*. This type of immunity statute is clearly broader than the phrase "no testimony given by a witness" which is used in R. S. 859. There is no doubt that Congress can elicit self-incriminating testimony from a witness provided the witness is offered, in exchange, an immunity from prosecution which is as broad as the Fifth Amendment.

An exhaustive review of cases which require the immunity statute to be as broad as the protection of the Fifth Amend-

528 ment is contained in 118 A. L. R. 605. It should also be noted that the Fifth Amendment does not give immunity against a State prosecution, as it does against a Federal prosecution. *U. S.* v. *Murdock*, (1931) 284 U. S. 141.

Questions which do not, on their face, require incriminating answers necessitate placing the burden of proof on the witness to show he had substantial reason to believe they demand answers tending to incriminate him. *Counselman* v. *Hitchcock*, *supra*; *U. S.* v. *Rosen*, (1949) 174 F. (2d)

187, cert. den. 338 U. S. 851. Several recent cases have identified specific types of questions as per se calling for incriminating answers. *Alexander* v. *U. S., supra; Kasinowitz* v. *U. S., supra; Blau* v. *U. S.*, 19 Law Week 4062 (Dec. 11, 1950). The Alexander case points out that a question such as "Do you know John Doe?" while not necessarily calling for an incriminating answer, will be held as incriminatory in character upon a showing that any connection with John Doe will subject the witness to a criminal charge of any sort. In addition, the Court is required to take the question in its setting, including other questions asked of the witness. *U. S.* v. *Weisman*, (1940) 111 F. (2d) 260. The witness must specifically claim his privilege under the 530
Fifth Amendment, not merely decline to answer the question. Arbitrary or fanciful claims of privilege, however, will not be sustained.

It is clear by now that numerous aspects of the proceedings must be proved to the Court to allow the Court to intelligently decide the issues which may well resolve themselves into questions of law. For example, the use of newspaper clippings has been sanctioned as admissible to show a reasonable apprehension of incrimination (*Alexander* v. *U. S., supra; U. S.* v. *Weisman, supra*), yet this type of evidence must be received with caution. It will certainly not be noticed judicially but must be introduced subject to objections as to relevancy, authenticity and the usual objections to documentary evidence. On a pre-trial motion
to dismiss, similar to the motions presented in the cases 531
under consideration here, Judge Caffey of the United States District Court for the Southern District of New York ruled that the procedure in the resolution directing the certification of a case under 2 U. S. C. 192 to the United States Attorney would not be considered on a motion to dismiss, but would be reserved as a matter of defense at the trial. His opinion is reported in *U. S.* v. *Josephson*, (1947) 74 F. Supp. 958, affirmed, in an opinion which did not discuss

this point, 165 F. (2d) 82, cert. den. 333 U. S. 838. It should also be noted that the U. S. District Court for the District of Hawaii in the case of *U. S.* v. *Yukio Abe*, Crim. No. 10,355 (Nov. 17, 1950), took cognizance of these problems in deferring a ruling on a motion to dismiss identical to those presented here until the trial of the general issue. Nothing but confusion would result from trying these cases in a piecemeal manner. These several motions to dismiss may undoubtedly be raised with propriety during the course of the trial when there is sufficient evidence before the Court to show the incriminating characteristics of the answers as well as the proper claim of immunity. However, the
533 Court is not in a position to resolve the issues as a question of law at the present stage of the proceedings, and the several motions to dismiss are accordingly overruled.

/s/ JAMES R. KIRKLAND
Judge
James R. Kirkland

January 31, 1951

534

535

Stipulation.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA v. PHILIP BART	Criminal No. 1746—50

IT IS HEREBY STIPULATED by the parties, through their counsel, as follows: 536

1. Pursuant to Section 121 of the Legislative Reorganization Act of 1946, 60 Stat. 828, and House Resolution 5 of the Eighty-First Congress, the House of Representatives created the Committee on Un-American Activities, hereinafter called the Committee.

2. On June 21, 1950, the members of the Committee were the following Representatives: John S. Wood (chairman), Francis E. Walter, Burr P. Harrison, John McSweeney, Morgan M. Moulder, Richard M. Nixon, Francis Case and Harold H. Velde.

3. On June 21st, 1950, the defendant, Philip Bart, appeared before the Committee at the Committee's chambers in Washington, D. C. pursuant to a subpoena duly served upon him, and then and there did testify before the said Committee. 537

4. That the transcript of the testimony, as taken by Althea Arceneaux, Official Reporter, of such hearing on June 21st, 1950, represents a true and accurate record of

the proceedings before the Committee on that date, including the testimony of the defendant, Philip Bart.

5. That House report No. 2489 as it appears on pages 12457, 12458,12459, 12460, 12461 and 12487 of the Congressional Record of the Eighty-First Congress, second session (Volume 16, August 10-11, 1950) is an accurate copy of the report of the Committee citing the defendant, Philip Bart, for contempt

6. That on August 12th, 1950, the Speaker of the House of Representatives made certification to the United States Attorney of a contempt citation against the defendant,
539 Philip Bart (Congressional Record, Eighty-First Congress, second session, page 12645, August 14, 1950). This was the only proceeding in which the defendant has been cited for contempt.

7. That the Daily Digest of the Congressional Record for the Eighty-first Congress, second session (page D461, June 21, 1950) is the summary referring to the hearings at which the defendant Philip Bart, testified on June 21st, 1950.

8. That the Congressional Record for June 1, 1950, page 8037, contains a true transcript of the comments on the floor of the House of Representatives concerning the New York Daily Worker and the representation of its employees in
540 the press gallery.

9. That Volume 1 of the hearings of the Committee on Un-American Activities, published by the United States Government Printing Office in 1938, on pages 622, 623 contains a reference to William Weiner and Ephraim Schwartzman concerning whom the defendant was questioned at his hearing.

10. That the index to the hearings of the Committee on Un-American Activities for Volumes 1-14, published by the United States Government Printing Office in 1942, reports reference to William Weiner on pages 150, 311f, 580, 622, 3086, 4281f, 4304, 4387, 5424f, 4747ff, 4851ff, 4824, 4831ff, 4859, 4890, 4896, 4899, 4901, 4908, 4930, 5770, 5787, 5830, 5993, 6598f, 7014f, 7356, 7391, 7461, 7479, 7493f, 7496, 7622, of the record of the hearings.

11. That the index to the hearings of the Committee on Un-American Activities for Volumes 1-14, published by the United States Government Printing Office in 1942, reports references to persons by the name of Childs on various portions of the record, as indicated on pages 43 and 44 of said index.

12. That the Appendix—Part 1, of the Report of the Special Committee on Un-American Activities, House of Representatives, Seventy-sixth Congress, on H. Res. 282, reports references to the Daily Worker and excerpts therefrom as set forth in the List of Exhibits of said Appendix.

13. This stipulation is agreed upon solely for the purposes of the trial herein. Both parties reserve their rights to object to the admission of any evidence, whether or not it be a subject of this stipulation, on the grounds of irrelevancy or immateriality, and also to object to any evidence not a subject of this stipulation on grounds of incompetency.

Dated: April 30, 1951.

/s/ James T. Wright
Attorney for Defendant

Attorney for Defendant
/s/ Charles B. Murray
Assistant United States Attorney

544

Verdict.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES v. PHILIP BART *Defendant*	Criminal No. 1746—50 Charge Violation Sec. 192 T. 2 U. S. Code (32 counts)

On this 3rd day of May, 1951, came the attorney of the United States; the defendant in proper person and by his
545 attorneys, James T. Wright and Abraham Unger, Esqs: whereupon the defendant waives trial by jury and the attorney of the United States consenting thereto, and with the approval of the Court, the trial proceeds.

It is adjudged by the Court that the defendant is guilty as charged in Counts one, two, three, four, five, six, seven and eight.

The defendant is permitted to remain on bond pending sentence and the case is referred to the Probation officer of the Court.

By direction of

BURNITA SHELTON MATTHEWS
Presiding Judge
Criminal Court #3

546

HARRY M. HULL, Clerk
By IRENE B. BURROUGHS
Deputy Clerk

Present:
United States Attorney

By CHARLES MURRAY
Assistant United States Attorney

F J ATTIG
Official Reporter

547

Sentence.

DISTRICT COURT OF THE UNITED STATES
for the
District of
Division

UNITED STATES OF AMERICA v. PHILIP BART	No. 1746-50

On this 1st day of June, 1951 came the attorney for the 548
government and the defendant appeared in person and [1] by his counsel, Jas. T. Wright, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty of the offense of Violation Sec. 192 Title 2, U. S. Code as charged [3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not 549
guilty, and a finding of guilty," or (4) "nolo contendre," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

550 *Sentence.*

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] Three (3) months and pay a fine of $500.00.

IT IS ADJUDGED that [5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the
551 commitment of the defendant.

/s/ BURNITA SHELTON MATTHEWS
United States District Judge.

The Court recommends commitment to: [6]

(*Signed*) ..... (*By*) .....
Clerk *Deputy Clerk.*

552

553

Notice of Appeal.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. PHILIP BART	Criminal No. 1746-50

Name and address of appellant
Philip Bart
263 Atkins St.
Brooklyn, N. Y.

554

Name and address of appellant's attorney
James T. Wright
2003—12th St. N. W.
Washington, D. C.

Offense Violation of Sec. 192 Title 2, U. S. Code
Concise statement of judgment or order, giving date, and any sentence Three months imprisonment and pay a fine of $500.00.
Name of institution where now confined, if not on bail
District Jail

555

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date 6/1/51

PHILIP BART
Appellant

JAMES T. WRIGHT
Attorney for Appellant

556

Order Extending Time to File Record on Appeal.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,045 April Term, 1951
Criminal No. 1746-50

PHILIP BART,
Appellant,

vs.

557 UNITED STATES OF AMERICA,
Appellee.

ORDER

On consideration of the appellant's motion for an extension of time to and including August 15, 1951, within which to file the record on appeal herein, it is

ORDERED by the Court that the motion be, and it is hereby, granted.

Dated: July 11, 1951

Per Curiam.

United States Court of Appeals
558 For the
District of Columbia Circuit
Joseph W. Stewart,
Clerk

A true Copy,
Test: JOSEPH W. STEWART
Clerk of the United States Court of Appeals
for the District of Columbia Circuit

559

Designation of Contents of Record.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES v. PHILIP A. BART	Criminal Action No. 1746-50

560

DESIGNATION OF RECORD ON APPEAL

Notice of appeal having been filed and given by the defendant in the above-named case, the following is designated to be included in the record on appeal to be filed with the Clerk of United States Court of Appeals for the District of Columbia:

1. The Indictment

2. The Arraignment and Plea

3. Motion for Bill of Particulars

4. Motion to Dismiss the Indictment

5. Affidavit of David Scribner, December 19, 1950. (United States v. Emspak.) 561

6. Supplemental Affidavit in Support of Motion to Dismiss the Indictment on Illegality of Grand Jury and Attached Exhibits. (United States v. Emspak.)

7. Excerpts from Transcript of Testimony dated January 19, 1951, pp. 235-238, United States v. Emspak.

562 *Designation of Contents of Record.*

8. Order and Opinion on Motion to Dismiss Indictment
9. Stipulation Dated April 3, 1951.
10. Government Exhibit No. 1.
11. The Verdict
12. The Sentence
13. The Reporter's Entire Transcript of Testimony
14. This Designation

/s/ JAMES T. WRIGHT
Attorney for Defendant
2003-12th Street N. W.

563

Service Accepted:

/s/ CHARLES B. MURRAY
Assistant United States Attorney

564

565

Clerk's Certificate.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA }
DISTRICT OF COLUMBIA } ss.:

I, HARRY M. HULL, Clerk of the United States District Court for the District of Columbia, do hereby certify the foregoing pages numbered 1 to 149, inclusive, to be the Certified Record Of Official Reporter as filed July 2, 1951, in the case of *United States of America* v. *Philip Bart*, Criminal No. 1746-50; and the foregoing pages numbered 566
150 to 206, inclusive, to be a true and correct transcript of the record, as the same remains upon file and of record in said Court, according to the designation filed by counsel in said case, except the following:

Item 7 of the Designation, Excerpts from Transcript of Testimony dated January 19, 1951, pp. 235-238, United States v. Emspak, is not included in this transcript for the reason same is not found on file.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington in said District, this 15th day of August, 1951.

[SEAL]

567

HARRY M. HULL
Clerk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11045

PHILIP BART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 19, 1952

Mr. James T. Wright for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Mr. Charles M. Irelan*, United States Attorney, *Mr. Joseph M. Howard*, Assistant United States Attorney, and *Mr. Charles B. Murray*, Assistant Attorney General, were on the brief, for appellee. *Mr. George Morris Fay*, United States Attorney when the record was filed, also entered an appearance for appellee.

Before PRETTYMAN, PROCTOR and BAZELON, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Philip Bart was indicted in thirty-two counts for refusal to answer that number of questions asked him by a Subcommittee of the Committee on Un-American Activities of the House of Representatives. Before or during the trial the Government abandoned twenty-four of the counts. Bart was convicted

upon the first eight counts of the indictment. From that conviction he appeals. The counts, and the questions involved in them, require somewhat different consideration and disposition.

Counts One and Two rest upon questions described thus: "Whether the defendant was born under the name of Philip Bart" and "When the defendant took the name of Philip Bart." It seems clear that Bart answered those questions. Without attempting to recite all the incidents in the record, it is sufficient that we quote this one:

> "Mr. Walter [Chairman of the Subcommittee]: When did you legally change your name?
> "Mr. Bart: Many years ago.
> "Mr. Walter: Where?
> "Mr. Bart: In the city of New York.
> "Mr. Walter: Did you have your name changed in court?
> "Mr. Bart: Yes; about 15 years ago."

The next four counts of the indictment involved questions described as follows:

Count Three

> "What was the name of the defendant when he came to the United States."

Count Four

> "What was the defendant's father's name."

Count Five

> "Under what name did the defendant's father become a citizen of the United States."

Count Six

> "What name did the defendant change his name from."

When Bart was asked these questions by the Subcommittee he did not answer but, instead, each time made reference to a statement already made. For example, when he was asked what his father's name was, he said,

"I have already dealt with this question." This was apparently a reference to an earlier statement that "I will not answer it because it is not pertinent to the hearing." After these four questions had been asked him, he said, "My answer is that I have answered what my name is here, which is the only question pertaining to the inquiry, it seems to me." It appears, therefore, that Bart took the position that these four questions were not pertinent to the inquiry.

Upon the oral argument in this court, counsel for Bart abandoned the point that these questions were not pertinent. So the controversy now posed concerns naked refusals to answer; that is, refusals without asserted legal justification. Counsel takes the position that prosecution for contempt will not lie for refusal to answer these questions, because Bart was not directed by the Committee to answer after he had once refused. He says that ever since Chief Justice Marshall's procedure in the *Burr* case[1] the courts have universally followed the practice of directing a witness to answer after the initial refusal to answer. He says that this is a universally accepted principle of law, founded in common sense, and applies to inquiries by congressional committees. He cites *United States* v. *Eisele*,[2] *Graham* v. *United States*,[3] and *May* v. *United States*.[4] But the *Eisele* case dealt with immunity from prosecution for testimony given after the witness had claimed the constitutional privilege against self-incrimination; the *Graham* case dealt with a claim of the privilege and, principally, the duty of a trial

---

[1] United States v. Burr, 25 Fed. Cas. 33, No. 14,692e (C.C. Va. 1807).

[2] 52 F.Supp. 105 (D.C.D.C. 1943).

[3] 99 F.2d 746 (9th Cir. 1938).

[4] 84 U.S. App. D.C. 233, 175 F.2d 994 (1949), *cert. denied*, 338 U.S. 830, 94 L.Ed. 505, 70 S.Ct. 58 (1949).

court to pass upon the incrimination involved; and the *May* case involved voluntary testimony. Those cases are not pertinent here.

We have held in No. 10943, *Emspak* v. *United States*, decided today, that there is no requirement that a specific direction to answer be given after a refusal to answer. Emspak's contention was directed to the necessity for a specific direction to answer after an asserted claim of the privilege against self-incrimination. It was clear upon the record, certainly as to some of the questions, that Emspak was made indisputably aware of the attitude of the Subcommittee toward his refusals and his grounds for the refusals; indeed his counsel made no contrary contention in that respect. In the present case the basic problem recurs in a different framework. For that reason we add to the discussion in the *Emspak* case.

Bart's argument in reliance upon the cases he cites (*Eisele*, *Graham* and *May*) is confused as to the issue here. In the first place it confuses the present problem with the problems of immunity from prosecution and the admissibility of testimony. The constitutional guaranty with which those cases were concerned (Amendment V) is that no person shall be compelled to testify against himself in a criminal case. As we pointed out in *May* v. *United States*, *supra*, the problem presented by that guaranty involves two conflicting interests, the right of the witness to refuse to answer and the importance to the public of the information sought. When the privilege is claimed by a witness it is the inquirer's duty "to determine whether he wishe[s] to exchange immunity for testimony."[5] If an inquirer wants information despite its unavailability against the witness, he must have authority to grant complete immunity to the witness. He exercises that authority by compelling the witness to answer. But it happens that Congress has not empowered its commit-

[5] Phrase quoted from United States v. Eisele, *supra* note 2, at 108.

tees to grant the necessary immunity,[6] and so they have not the power to compel incriminating evidence. Therefore, a witness before them is not in contempt if he refuses to answer in reliance upon the privilege, even after a specific direction to answer; provided that his claim to the privilege is valid, a matter which we shall discuss in a moment, and further provided that he has not waived the privilege after asserting it. Under present statutes relating to congressional committees, a direction to answer, conveying no immunity, has no effect one way or the other upon the witness's liability for contempt, except in so far as it serves to make certain that the witness intends to refuse.

The Congress has empowered other inquirers, for example, the Securities and Exchange Commission, to give immunity.[7] In such cases a witness is in contempt if he refuses to answer an incriminating question after being specifically directed to answer. The direction to answer after an assertion of the privilege conveys immunity.

Bart's argument upon the above-cited cases also confuses the problem of a specific direction to answer with the problem of deliberate intent to refuse to answer. As we pointed out in *Townsend* v. *United States*[8] and repeated in *Fields* v. *United States*,[9] the offense of contempt for refusal to answer is a deliberate and intentional refusal and not an inadvertence, an accident, or a misunderstanding. If a witness interposes an objection

---

[6] United States v. Bryan, 339 U.S. 323, 335-336, 94 L.Ed. 884, 70 S.Ct. 724 (1950).

[7] United States v. Eisele, *supra;* 48 STAT. 900 (1934), 15 U.S.C. § 78u(d).

[8] 68 App. D.C. 223, 229, 95 F.2d 352, 358 (1938), *cert. denied*, 303 U.S. 664, 82 L.Ed. 1121, 58 S.Ct. 830 (1938).

[9] 82 U.S. App. D.C. 354, 357, 164 F.2d 97, 100 (1947), *cert. denied*, 332 U.S. 851, 92 L.Ed. 421, 68 S.Ct. 355 (1948).

or query to the propriety of a question, *e.g.*, its pertinency, he may not be refusing to answer. In such event both elementary justice and statutory provision require that he be made aware, by some method at some time, that despite his position the inquirer means that he shall answer the question. That requirement is not for a specific direction, in terms, to answer; it may be in a preliminary [10] or a subsequent statement [11] or in a repetition of the question.[12] If the actual questioner be counsel instead of the inquiring authority, or a member of it, the attitude (*i.e.*, the acceptance or non-acceptance of the refusal upon the grounds presented) of that authority may be made clear by prior announcement or by acquiescence or ratification. That phase of the matter must be determined from the circumstances.

Whether a witness means to refuse to answer is a question to be determined from all the circumstances. Like the element of intent in every criminal case it is a question of fact, determinable by the jury, if there be a jury, under appropriate instruction and definition by the court. A specific direction to answer is undoubtedly the better, more just practice and the one most likely to make certain whether the witness is intentionally refusing. We are told that the committees and subcommittees of Congress are now pursuing that course. But the problem before us concerns necessity, not merely desirability. A specific direction to answer is not necessary; intent to refuse to answer is necessary.

In *United States* v. *Murdock* [13] the Supreme Court ruled that an authoritative determination upon an asserted right to refuse to answer is not a necessary prerequisite to a prosecution for willful failure to answer. The Court said: "By the very terms of the definition the

---

[10] See Sinclair v. United States, 279 U.S. 263, 73 L.Ed. 692, 49 S.Ct. 268 (1929).

[11] See discussion *infra*.

[12] See Emspak v. United States, *supra*.

[13] 284 U.S. 141, 148, 76 L.Ed. 210, 52 S.Ct. 63 (1931).

offense is complete at the time of such failure." Conviction for contempt was there affirmed. The record showed that the inquirer gave no direction to answer after the refusal, but it also showed that Murdock was made fully aware, in an extended discussion before the refusals, of the intentions of his questioners and of the consequences of refusal to answer their contemplated questions.

If a witness flatly and without purported explanation, justification or excuse refuses or fails to answer a question, there is no necessity to repeat the question, or to coax him, threaten him, persuade him, or press him. A witness duly subpoenaed and sworn is presumed to know the elementary requirements of compliance and the corresponding dangers of refusal to answer.

A witness does not insulate himself from contempt by asserting a reason for a refusal to answer, or by objecting to the question, or by querying its propriety. When he deliberately and intentionally refuses to answer upon a stated ground, he assumes the risk that the ground is unsound. This was the holding of the Supreme Court in the *Sinclair* case.[14] If he refuses to answer because he says the answer would incriminate him, or says the question is not pertinent, or says that the question is improper because violative of First Amendment guaranties, he assumes the risk that a court in a later proceeding may find that his stated reason was not valid, that the answer would not tend to incriminate him, or that the question was pertinent or was not violative of any constitutional guaranty. As the Supreme Court pointed out in *Rogers* v. *United States*,[15] the court must determine in every case in which the privilege against self-incrimination is claimed "whether the question presented a reasonable danger of further crimination in the light of all the circumstances". And to the same effect is *Sinclair* v.

---

[14] *Supra* note 10.

[15] 340 U.S. 367, 374, 95 L.Ed. 344, 71 S.Ct. 438 (1951).

United States, supra, relating to pertinency. In both those instances the Court affirmed convictions for contempt, the witness being held to be in error in his asserted ground for refusal.[16]

It is true that in the present condition of the statutes on immunity a witness before a congressional committee is in a difficult position, and the risk he assumes is considerable. In court our established procedure provides a prompt, authoritative ruling and an opportunity for the witness to recanvass his position in the light of the ruling. The same thing was to a less extent true in the days when Congress itself conducted proceedings for contempt against it. But Congress adopted the practice of referring charges of contempt to the courts; and so now an authoritative ruling upon the validity of a witness's position comes at a time when, and in a forum where, the witness cannot reexamine his position in the light of the ruling. He is no longer before his inquirer (the congressional committee), and so he has no opportunity to reconsider his refusal and to answer the question. But the cure for that ill is for the Congress, not for the courts.

The present controversy as posed to us by counsel involves a naked refusal to answer. But, as we have pointed out, the record shows that Bart interposed an objection to these questions on the ground of pertinency.

---

[16] See also Heike v. United States, 227 U.S. 131, 57 L.Ed. 450, 33 S.Ct. 226 (1913); Mason v. United States, 244 U.S. 362, 61 L.Ed. 1198, 37 S.Ct. 621 (1917); Townsend v. United States, *supra;* Morford v. United States, 85 U.S. App. D.C. 172, 176 F.2d 54 (1949), *rev'd on other grounds,* 339 U.S. 258, 94 L.Ed. 815, 70 S.Ct. 586 (1950), 87 U.S. App. D.C. 256, 184 F.2d 864 (1950), *cert. denied,* 340 U.S. 878, 95 L.Ed. 638, 71 S.Ct. 120 (1950); Barsky v. United States, 83 U.S. App. D.C. 127, 134, 167 F.2d 241, 248 (1948), *cert. denied,* 334 U.S. 843, 92 L.Ed. 1767, 68 S.Ct. 1511 (1948); Loew's, Inc. v. Cole, 185 F.2d 641, 659 (9th Cir. 1950), *cert. denied,* 340 U.S. 954, 95 L.Ed. 688, 71 S.Ct. 570 (1951).

We refer to that situation for a moment. It clearly appears from the record that Bart was made fully aware both of the position of the subcommittee and of the possible consequences of his refusal to answer. After he had refused to answer the four questions involved in these counts, the Chairman of the Subcommittee said: "And then I suppose you know that under the law a question innocent on its face can't be arbitrarily ignored. You can't refuse to answer such a question without running the risk of the consequences." And in that connection the Chairman also remarked that Bart's counsel knew what the law was. Those statements of the Chairman fully met the requirements of the law as we have stated them above. They constitute sufficient evidence to justify a finding that the refusal to answer was deliberate and intentional, and thus they support the general verdict of guilty.

We hold, as we held in the *Emspak* case, *supra*, that a specific direction to answer is not a prerequisite to conviction for contempt.

Count Seven of the indictment was for refusal to answer "Whether the defendant would briefly summarize for the sub-committee the positions held by him from which he had received a salary or gratuity, prior to the position which the defendant held at the time the question was asked." The record shows that Bart replied that it was evident from the question that a newspaper was involved, and he refused to answer because the question infringed upon the freedom of the press and was in violation of the First Amendment to the Constitution. Counsel for the Subcommittee then inquired, "That is the ground upon which you refuse to answer the question as to what positions you have held prior to your present position?". Thereupon, without any intervening word, the Chairman of the Subcommittee said, "Did you ever hold any positions other than positions with newspapers?". Bart replied, "I did," and then proceeded to state in some detail these other positions which he had held. The original question, involving the newspaper, was not repeated.

Thus it appears that, when the question upon which this count of the indictment was based was asked, the witness asserted that it infringed a constitutional guaranty, and thereupon the question was reframed to eliminate that objection. In short, when the constitutional infirmity of the question was raised, the Committee abandoned the question as asked and asked another question. Under these circumstances the witness was not in contempt of the Committee in declining to answer the question as originally asked. The Committee indicated clearly that it agreed with his view of the initial question. Abandonment of a question is in no sense unusual, and the Committee's intent to abandon in this instance is clear. No contrary evidence appears.

Count Eight of the indictment was for the refusal of Bart to answer a question described thus: "Who were the other officials of the Ohio section of the Communist Party during the period when the defendant was organizer there." It is agreed, and clearly appears from the record, that in response to this question Bart asserted the constituutional privilege against self-incrimination guaranteed by the Fifth Amendment. The Government says that this privilege was not available to Bart at the time he asserted it, because this question was related merely to the details of an answer already given and a reply to this question would not enlarge the incrimination, if any, already implicit in the prior answer given without objection. The Government relies upon *Rogers* v. *United States*.[17]

In the Rogers case the accused testified without objection that she had been Treasurer of the Communist Party of Denver but that she had given up possession of the records and had turned them over to another person. The Supreme Court held to the rule, to which it said federal courts have universally held, that "where criminating facts have been voluntarily revealed, the privilege

[17] *Supra*, 340 U.S. 367.

cannot be invoked to avoid disclosure of the details." [18] The Court further said (as we have already pointed out) that, when the witness was asked to furnish the name of the other person, "the court was required to determine, as it must whenever the privilege is claimed, whether the question presented a reasonable danger of further crimination in the light of all the circumstances, including any previous disclosures." [19] The Court held that after the witness's admission that she had held the office of Treasurer disclosure of the name of her successor presented no more than a "mere imaginary possibility" of increasing the danger of crimination.

The petitioner in the *Rogers* case made the further contention that, even if the testimony that the witness had been Treasurer of the Party had subjected her to possibility of prosecution for violation of the Smith Act, further testimony indicating that she knew the name of her successor in office would subject her to possible prosecution for conspiracy to violate that Act. The Court referred to *Blau* v. *United States* [20] as explicitly rejecting that contention. The Court held that questions relating to activities in the Communist Party are criminating both as to violation of the Smith Act and as to conspiracy to violate that Act. It held that, although a conspiracy must necessarily involve at least two persons, one person can be convicted of conspiring with persons unknown, and that therefore the identity of other members of a conspiracy is not essential to the conviction of one conspirator.

In the case before us Bart testified: "I was organizer and head of the Communist Party at different times, in different years. . . . In Illinois and Pennsylvania, among

---

[18] *Id.* at 373.

[19] *Id.* at 374.

[20] 340 U.S. 159, 95 L.Ed. 170, 71 S.Ct. 223 (1950).

many." He was then asked whether he had been a section organizer for the Communist Party in Ohio. He replied, "Most likely." The question was repeated, and he said that he did not know the exact period of time—"It is 14 years ago." He was then asked the question quoted in Count Eight and to that question asserted the privilege against self-incrimination.

We think the opinion and decision in the *Rogers* case, *supra*, supports the Government's position in respect to Count Eight. If appellant's equivocal answer, "Most likely", to the question directly mentioning Ohio be deemed an affirmative, clearly the identity of other persons in the Ohio section of the Party would not, under the doctrine of the *Rogers* case, increase the danger already incurred by the admission. If the "Most likely" be treated as no answer at all, nevertheless the incrimination effected by the admission of Party membership and activity in Illinois and Pennsylvania was not increased by acquaintance with members in Ohio. Violation of the Smith Act [21] was the potential crime, and it consisted of advocacy of the overthrow of the Government by force and violence, conspiracy to do so, or membership in or organization of a society or group having that objective. Membership in the Communist Party was not the crime but was one link in proof of the crime. So, if Bart admittedly was active in the Party in Illinois and Pennsylvania, the fact that he knew Party officers in Ohio would not increase the possibility of incrimination for violation of the statute. The advocacy which, by the admission, might be deemed to have occurred in Illinois and Pennsylvania, was not increased as a potential incrimination because it began or continued in Ohio. At most, the information as to Ohio could only add a third possible venue to the two already established for the prosecution of the offense by

[21] 62 STAT. 808 (1948), 18 U.S.C. § 2385.

the admission as to Illinois and Pennsylvania.[22] We think that under the *Rogers* case the identity of the other officials of the Ohio section of the Communist Party when Bart was admittedly the organizer in Illinois and Pennsylvania could not increase the danger of incrimination already incurred by him in his prior testimony.

Appellant also asserts as error the refusal of the trial court to dismiss the indictment. The motion to dismiss was upon the ground that of the twenty members of the indicting grand jury ten were Government employees and two more were wives of Government employees. This is the same point, indeed the same grand jury, involved in *Emspak* v. *United States*. The point was there decided against the contentions of the appellant.

Whether, in view of the foregoing, we should affirm in respect of Counts Three to Six, inclusive, or should remand for a new trial on those counts is a problem different from that presented in No. 11081, *Quinn* v. *United States*, also decided today. There the trial court ruled explicitly that as a matter of law the sole defense offered was not available. Thus the resulting judgment of conviction was not based upon the evidence offered pro and con; it was based upon the evidence offered by the prosecutor alone. So, when we reversed upon the legal question, a claimed factual defense was made available to the accused, and it was necessary that a new trial, in which that defense would be considered, be had. In the present case, as to Counts Three through Six there was a general judgment of guilty. Had there been a jury, there would have been instructions embodying statements of the law to be applied. But there was no jury and no instructions and no statement of the law applied. In such a case the only question for us is whether there was sufficient evidence to support the judgment. We find that

[22] 62 STAT. 826 (1948), 18 U.S.C. § 3237.

there was. That ends our consideration. It is suggested, in effect, that we make three assumptions, (1) that the trial court erred upon a legal point in respect to Count Seven, (2) that therefore it made the same error in respect of Counts Three to Six, inclusive, and (3) that it did not resolve any conflicts in evidence in reaching its finding on those counts. It is our view that we cannot make any of those assumptions. In viewing the conviction under Count Seven we find, as we have indicated, the evidence conclusive upon the face of the record; there was no contradictory evidence to support the finding of guilt on that count; hence we reverse. In respect to Counts Three through Six we find substantial evidence to support the judgment. We cannot speculate that the trial court in its own mind made an error of law not stated or shown on the record.

The judgment of conviction on Counts One, Two and Seven is reversed and on Counts Three, Four, Five, Six and Eight is affirmed. Since the sentence (three months' imprisonment and a fine of $500.00) is supported by the conviction on any of the counts, that judgment is

Affirmed.

BAZELON, *Circuit Judge*, dissenting: All of the circumstances and pleadings relating to the issue of the qualifications of Government employees to serve as grand jurors in this case are identical with those in *Quinn* v. *United States*.[1] For the reasons set forth in my opinion in that case, I would reverse and remand for a new trial here.

I think there is another ground for ordering a new trial, based upon my view in *Quinn* of the words "re-

[1] Decided by this court today, — U.S.App.D.C. —, — F.2d —.

fuses to answer" in § 192.[2] I shall discuss only the impact of this view upon the instant record.

Here the court relies upon certain statements in a colloquy between appellant and his counsel, on the one hand, and Committee members and their counsel, on the other, as showing that appellant was made aware that his grounds for objecting to answer were overruled by the Committee.[3] Concededly, those statements are pertinent. But so is the statement of the Committee chairman that "• • • we don't rule on objections."[4] And in response to a Committee member's suggestion that the witness "be advised of the possibilities of contempt," the Committee chairman said: "No, he has counsel. Counsel knows that is the law."[5] In my view the record presents seriously conflicting statements which raise a question of fact for the trial court. An examination of the record demonstrates that the court, sitting without a jury, did not so understand the matter. For while it found that appellant "comprehended that he was refusing to answer those questions,"[6] this conclusion was not based upon findings, express or implied, (1) that appellant was clearly apprised that his grounds for not answering were rejected by the Committee and (2) that he was afforded another opportunity to answer. This, I think, is manifest from appellant's conviction on Count 7. There he was charged with refusing to answer a question after Committee counsel merely repeated the grounds for appellant's objection, and then proceeded immediately to propound another question. This court reverses that conviction

---

[2] 11 STAT. 155 (1857), as amended, 52 STAT. 942 (1938), 2 U.S.C. § 192 (1946).

[3] Majority opinion, p. 9.

[4] J.A., p. 14.

[5] *Id.* at 12.

[6] J.A., p. 105.

because "the Committee abandoned the question as asked and asked another question. * * * The Committee indicated clearly that it agreed with [appellant's] view of the initial question." [7] Thus, the only thing that suggests that the Committee meant to have an answer to the question in Count 7 was its subsequent certification for contempt, initiating the indictment here. If the trial court applied the same view in considering all of the other counts, and there is no contrary indication, then clearly it committed similar error as to those counts.

Appellant asserted lack of pertinency as the ground for not answering the questions involved in Counts 3, 4, 5 and 6. At the oral argument here, appellant's counsel conceded that those questions were pertinent. "So," says the court, "the controversy now posed concerns naked refusals to answer." [8] As I made clear in *Quinn*, a naked refusal, *i.e.*, "a refusal without a statement, at the time, of the reason therefor" does not require affirmative action by the inquiring authority.[9] Thus the court, in effect, treats counsel's concession as a retroactive waiver of appellant's right to "be made aware," as stated in the court's present opinion, "by some method at some time, that despite his position the inquirer means that he shall answer the question." [10] I cannot reconcile this result with the ~~court's~~ decision in *Quinn* today where the court said, ~~"That~~ "It must appear that [a witness] was aware of the intention of his inquirer that answers were required despite his objections." [11]

This court affirms the conviction on Count 8 on the ground that under the *Rogers* [12] doctrine appellant's claim

---

[7] Majority opinion, p. 10.

[8] *Id.* at 3.

[9] — U.S. App. D.C. —, — F. 2d —.

[10] Majority opinion, p. 6.

[11] — U.S. App. D.C. —, — F. 2d — slip opinion, pp. 9-10.

[12] Rogers v. United States, 340 U.S. 367 (1951).

of the privilege against self-incrimination was unavailing.[13] I do not reach a consideration of that issue because, as this court agrees, there is no basis for treating a claim of the privilege against self-incrimination differently from any other objection to answer.[14] It therefore follows that even under Count 8, the fact finder must still weigh, on the one hand, the Committee's statement advising that the claim of the privilege was not available, and, on the other hand, the Committee's statements that it would not rule on objections. Thus, before this court can consider the validity of appellant's claim of the privilege, it must first determine that the court below found that the witness had been clearly apprised of the Committee's adverse ruling and afforded another opportunity to answer.[15]

---

[13] See majority opinion, pp. 10-13.

[14] *Id.* at 4, *et seq.*

[15] *See* Quinn v. United States, *supra*, slip opinion, p. 36.

207 In the United States Court of Appeals for the District of Columbia Circuit

October Term, 1952

No. 11045

PHILIP BART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before PRETTYMAN, PROCTOR and BAZELON, Circuit Judges

[File endorsement omitted.]

Judgment

December 19, 1952

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed as to the conviction under Counts One, Two, and Seven, and that the judgment of conviction as to Counts Three, Four, Five, Six, and Eight, be, and it is hereby, affirmed.

Per Circuit Judge PRETTYMAN.

Dated: December 19, 1952.

Separate dissenting opinion by Circuit Judge Bazelon.

208 Petition for rehearing covering 5 pages filed February 24, 1953, omitted from this print. It was denied and nothing more by order April 15, 1953.

210 II

The opinion of the majority of the Court on the issue of the sufficiency of evidence as well as the view of the dissenting Judge requires the granting of the petition for a rehearing.

It is submitted that the reasoning of the majority of the Court in reversing the conviction on Counts One, Two, and Seven apply with equal force to the other counts in the indictment under which

appellant was convicted, namely, that appellant had in fact answered the questions propounded to him, or they were abandoned by the Committee. Because of the manifest confusion upon the face of the record, it would appear that the trial Court's verdict is contrary to the weight of the evidence and that the required standard, i. e., guilt beyond a reasonable doubt, was not fully considered by the Court acting as the finder of fact.

This is clearly demonstrated by the reasoning of the dissenting judge when he points out:

"In my view the record presents seriously conflicting statements which raise a question of fact for the trial court. An examination of the record demonstrates that the court, sitting without a jury, did not so understand the matter. For while it found that appellant 'comprehended that he was refusing to answer those questions J. A., P. 105,' this conclusion was not based upon findings, express or implied, (1) that appellant was clearly apprised that his grounds for not answering were rejected by the Committee and (2) that he was afforded another opportunity to answer. This, I think, is manifest from appellant's conviction on Count 7. There he was charged with refusing to answer a question after Committee counsel merely repeated the grounds for appellant's objection, then proceeded immediately to propound another question. This court reverses that conviction because 'the Committee abandoned the question as asked and asked another question. * * * The Committee indicated clearly that it agreed with [appellant's] view of the initial question.' Thus, the only thing that suggests that the Committee meant to have an answer to the question in Count 7 was its subsequent certification for contempt, initiating the indictment here. If the trial court applied the same view in considering all of the other counts, and there is no contrary indication, then clearly it committed similar error as to those counts."

211 III

The opinions of Judges Prettyman, Washington, Fahy, Chief Judge Stephens and the dissent of Judge Bazelon, require a rehearing on the issue of the denial of appellant's motion for a rehearing on the challenge to the validity of the grand jury.

The opinion of Judges Prettyman, Washington, Chief Judge Stephens, Fahy, and the dissent of Judge Bazelon disposes of appellant's position that the trial Court erred in denying a hearing of the motion challenging the validity of the indicting grand jury, on the basis of their opinions on Emspak and Judge Bazelon in the instant case. For the convenience of the Court, the arguments urging a rehearing on this point will not be restated, but appellant respectfully incorporates by reference the arguments

of counsel on this issue advanced in the petition for rehearing in Emspak and Quinn filed on January 2, 1953, and urge that on the basis of those arguments that a rehearing be granted the appellant on this point.

IV

The opinion of the concurring Judges in Emspak and the dissent of Judge Bazelon in the instant case on the issue of "direction" requires the granting of the petition for a rehearing.

Here, too, it is respectfully submitted, that for the Court's convenience appellant does not restate the position but incorporates by reference, the arguments urged upon the Court in connection with this issue raised by counsel in Emspak's petition for rehearing filed on January 2, 1953. Moreover, it is suggested to the Court that under the circumstances of this case desirability and necessity are synonymous.

In view of this, on the issue of "direction" the appellant is entitled to a rehearing.

212

Conclusion

Appellant respectfully submits that the petition for rehearing should be granted.

James T. Wright,
2003 12th St. NW., Washington 9, D. C.,
Attorney for Appellant.

Dated February 17, 1953.

Certificate of Service

Copy of foregoing petition was mailed to the office of the United States Attorney for the District of Columbia on February 17, 1953, postage prepaid.

James T. Wright.

Certificate of Good Faith

I certify that the foregoing petition is filed in good faith and not for purposes of delay.

James T. Wright.

213 In the United States Court of Appeals for the District of Columbia Circuit

[Title omitted.]
[File endorsement omitted.]

Order denying petition for rehearing

Filed April 15, 1953

Upon consideration of appellant's petition for rehearing in the above entitled case, it is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied.

Dated April 15, 1953.

Per Curiam.

Circuit Judge Bazelon dissents from the above order.

214 DESIGNATION OF RECORD

[Omitted in printing.]

215 [Clerk's certificate to foregoing transcript omitted in printing.]

216 Supreme Court of the United States

No. ____ October Term, 1952.

PHILIP BART, PETITIONER

v.

UNITED STATES OF AMERICA

Order extending time to file petition for writ of certiorari

May 15, 1953

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 25, 1953.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 15th day of May, 1953.

No. 5, Misc. ____. October Term, 1953

[Title omitted.]

On petition for writ of certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

Order granting certiorari

June 7, 1954

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket and assigned for argument immediately following No. 66.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1954